116-380

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~372~~ 102

B. W. MOWER, PLAINTIFF IN ERROR,

vs.

NATHAN FLETCHER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 In the Supreme Court of the State of California.

NATHAN FLETCHER, Plaintiff and Appellant,
vs.
B. W. MOWER, Defendant and Respondent. } No. 7085.

Transcript on Appeal.

John D. Bicknell, attorney for plaintiff and appellant.
J. W. Stump, attorney for defendant and respondent.

2 *Complaint.*

In the District Court, Seventeenth Judicial District, State of California, in and for the County of Los Angeles.

NATHAN FLETCHER, Plaintiff, *vs.* B. W. MOWER, Defendant.

The plaintiff complains and alleges:

I.

That he was the owner in fee of the real estate hereinafter described, and that on or about the 1st day of December, 1875, he agreed to sell the same to the defendant for the sum of one thousand dollars in gold coin, and thereupon the plaintiff executed in writing and
3 delivered to defendant his agreement to convey to said defendant the following described lands, situate in Los Angeles county and State of California, to wit:

W. ½ of S. W. ¼ of N. W. ¼ of section 32, T. 2 S., R. 13 W., S. B. M., upon the defendant paying plaintiff the full sum of one thousand (1,000) dollars in manner following: Five hundred (500) dollars at the date of said agreement, and the further sum of five hundred (500) dollars in eighteen months from said date, with interest thereon at one per cent. per month from that date.

II.

That said defendant agreed to pay the plaintiff said amount for said lands in manner as above alleged, and did pay the plaintiff five hundred (500) dollars, part of said purchase-money, on the day of the execution of the said agreement to convey, and did at the same time execute and deliver to the plaintiff his promissory note for the sum of five hundred (500) dollars in gold coin, the residue agreed to be paid plaintiff for his said lands; said note being due and payable eighteen months after date, bearing interest at one per cent. per month, said interest being payable every twelve months.

III.

That since the delivery of said note to the plaintiff as
4 aforesaid he has, in some manner to him unknown, lost said note, and said note is not now in his possession.

IV.

Plaintiff further alleges that on the 1st day of August, 1877, be-

fore the commencement of this action, he tendered the defendant a deed of bargain and sale, duly executed by him, in pursuance of the agreement to convey hereinbefore mentioned, conveying to said defendant the fee-simple title of said lands herein described, and at the same time gave defendant notice that said note executed by defendant to this plaintiff as part consideration for said lands as hereinbefore described has been lost since the same was delivered to this plaintiff, and tendered defendant a bond executed by plaintiff herein, with two sufficient sureties thereon to indemnify him against any lawful claim made upon or account of said note, and demanded the payment of said note, and at the same time offered and tendered said defendant said deed and said bond upon the payment of said note.

V.

That said defendant refused to pay said note or any part thereof, and said plaintiff offers in court and files herewith said deed and said bond, and tenders the same to said defendant upon his
5 paying plaintiff said note of five hundred (500) dollars in gold coin, with interest thereon at one per cent. per month from December 1st, 1875, with the costs of this action.

VI.

That the plaintiff is now the lawful owner of said note, and no part of said note has been paid, and there is now due plaintiff from defendant on said note the sum of five hundred (500) dollars in gold coin, with interest thereon at one per cent. per month from December 1st, 1875.

Wherefore the *defendant* prays for judgment against the said defendant for the sum of five hundred (500) dollars gold coin, with interest at one per cent. per month from December 1st, 1875, and for costs of suit, and that the usual decree may be made for the sale of said premises by the sheriff of Los Angeles county according to law and the practice of the court; that the proceeds of said sale may be applied in payment of the amount due the plaintiff, and that the defendant and all persons claiming under him may be barred and foreclosed of all right, claim, or equity of redemption in the said premises and every part thereof, and that the said plaintiff may have judgment and execution against the said defendant for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

6 That the plaintiff may become purchaser at said sale. That the sheriff execute a deed to the purchaser. That said purthe sheriff's deed therefor, and that the plaintiff have such further chaser be let into the possession of the premises on production of relief in the premises as may be just and equitable.

JOHN D. BICKNELL,
Attorney for Plaintiff.

Duly verified and filed Aug. 2d, 1877.

Amended and Supplemental Answer.

Title of Court and Cause.

And now comes the defendant in the above-entitled cause and, leave of court first having been obtained, files his amended and supplemental answer, and thus answering:

1. Admits that plaintiff agreed to sell to defendant the land mentioned in said complaint in the month of December, 1875, but alleges that said agreement was not in the form of an agreement to convey, but was in the form of a bond for a deed, bearing date Dec. 20th, 1875, said bond calling for a good and sufficient conveyance for said land.

2. Admits that at the same date of said bond defendant did execute his note for the balance of said purchase-money as
7 mentioned in said complaint, and for the amount, rate of interest, and time therein mentioned, and that no part, either of said principal or interest thereon, has been paid.

3. Admits the tender of said bargain and sale deed for said land as alleged in said complaint, and also said notice of the loss of said note and the tender of said indemnity bond, and also the demand of said plaintiff for the payment of said note and interest and that defendant refused to pay the same or any part thereof.

4. Further answering defendant denies that on the day mentioned in said complaint, to wit, the 1st day of Dec., 1875, or at any other time or at all plaintiff was the owner in fee of the real estate described in said complaint, to wit, the W. ½ of the S. W. ¼ of the N. W. ¼ of sec. 32, T. 2 S., range 13 W., S. B. M.

5. Defendant further answers and alleges that said bond for a deed and the payment of said money and the execution of said note were done, delivered, and received on the representations of plaintiff made to defendant, that said plaintiff was seized in fee of said real estate, and that defendant's acts were performed in reliance upon the truth of said representations.

That said representations of plaintiff were not true, and that
8 they were calculated to deceive and to defraud defendant, and that he was thereby deceived and defrauded.

6. Further answering defendant alleges that there was and is an entire failure of the consideration of said note, said money and said note having been paid and given in consideration, and with the assurance of said plaintiff that the title in fee to said land was in said plaintiff.

7. Defendant further answering denies that said land is or ever was in fee in said plaintiff, and denies that there is or ever was any consideration for said money paid and for said note given, and denies that said deed of bargain and sale did or could convey the fee-simple title to said lands described in said complaint, and denies that said deed thus tendered was and is a good and sufficient conveyance for said lands as required by the terms and conditions of said bond.

8. Said defendant, for a further and separate answer, alleges that said land and premises described in said complaint, and the whole

thereof, is and was at the time mentioned in said complaint, to wit, the first day of December, 1875, public domain of the United States, and that said land for more than 90 days prior to said 1st day of December, 1875, was duly surveyed by the United States authorities, and the township plats including said land duly filed in the
9 United States district land office in Los Angeles, in which district said land is situated, and said land was and is subject to the operation of the general laws of the United States relating to the disposition and possession and purchase of her public lands, and is and was, at and long prior to the time of the execution of said bond and giving of said note, subject to pre-emption settlement under the pre-emption laws of the United States.

9. That heretofore, to wit, on or about the 12th day of March, A. D. 1876, the defendant entered and settled upon the S. ½ of the N. W. ¼ and the N. ½ of the S. W. ¼ of sec. 32, township 2 south, range 13 W., S. B. M., within which the said land mentioned in said complaint is situated, and erected a dwelling house and made other valuable improvements upon the said land so settled upon, as above set forth and described, and has ever since resided upon and cultivated the same, claiming and holding it as a pre-emption under the laws of the United States, and still and now so claims and holds the same.

10. That the defendant is and was at the time he settled, as hereinbefore mentioned, a citizen of the United States, over the age of twenty-one years, and has never had the benefit of the pre-emption laws in any of the States or Territories of the United States, and did not quit or abandon his residence on his own land in said
10 State to settle upon the public lands in said State or said land described, was not then and is not now the owner of 320 acres of land in any of the States or Territories of the United States, and was at said date of his settlement as aforesaid a duly qualified pre-emption settler, and that he did not settle upon said land for the purpose of acquiring title thereto for any person other than himself, and neither has, directly or indirectly, made any agreement or contract with any person or persons whatever whereby the title which he might acquire from the United States would inure in whole or in part to the benefit of any person or persons other than himself, and his said settlement was not made for the purpose of speculation but in good faith and with a view to making said premises a home.

11. That said land is agricultural land and not mineral land and the same has not yet been proclaimed for sale.

12. That said defendant claims as aforesaid 160 acres of land only, and that thus claiming said land he has fully complied with the pre-emption laws of the United States in every particular; that since his said entry upon said land he made known his claim in writing to the register of the proper land office within the time prescribed by law, and did file his declaratory statement on said land by
11 tendering the same in due form, by tendering and depositing the same with the register and receiver of the proper United States district land office, and within the time prescribed by United States pre-emption laws, for the said land claimed by him, together with all legal fees required therefor; and thereafter, said defendant

having fully complied with the said pre-emption laws, did tender full and complete proof of his settlement, improvements and full compliance with the pre-emption laws of the United States and tendered the full Government price therefor to said register and receiver with all legal fees and commissions required therefor, and requested to be allowed and offered to make entry of said land at said land office, and that he has in all respects complied with the requirements of said pre-emption laws so far as he has been permitted to do so by said land officers, and that his said application to enter said land and tender of proof and payment, etc., are now pending before the Land Department of the United States, and by virtue of the full compliance with all the requirements of the pre-emption laws of the United States by said defendant he has acquired title to the said land claimed by him and a vested interest therein from the Government of the United States, and is the owner of the same and is entitled to a patent from the United States for the said tract of land so claimed and owned by him.

12 13. And for a further answer and defense defendant alleges that the land and premises by the plaintiff herein particularly, and the said land claimed by defendant hereinafter described, and the whole thereof, was at all times from the year 1837 to the 21st day of November, A. D. 1871, within the claimed and exterior limits of a valid Mexican grant, to wit, the Rancho Sausal Redondo, and was at all times between the dates last aforesaid claimed by the grantees of said rancho and their assigns as a part of said grant, and said land was thus reserved from other appropriation, and was not subject to selection by the State of California as indemnity school lands or otherwise between said dates.

14. Defendant further avers that plaintiff claims title to said land, and in no other way than by reason of a patent of the State of California, issued by the Governor of said State, in satisfaction and by reason of a pretended, insufficient, and fraudulent application, illegally made for said land on or about the 6th day of March, A. D. 1868; that said pretended application was made by one Elmore W. Squires, who did not sign the same, and that said application was not accompanied by an affidavit of three disinterested persons, stating, among other things, that said applicant was a resident of the State, and that the lands were unoccupied by any person ex-

13 cept the applicant, as required by an act of Congress entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27, 1863. That said E. W. Squires omitted and neglected to file in the office of the county recorder of the county in which said land was situated a description of the land applied for, with a certificate of the oath or affirmation endorsed thereon, as required by the 29th section of the said act of April 27th, 1863.

15. That said application was made and accepted by the State locating agent prior to the survey of said land and while said Rancho Sausal Redondo was still unsurveyed, and the said application was made by and for the benefit of said E. W. Squires, and said application to purchase was pretended to have been made to the State of California under the provisions of said act of April 27th, 1863, but

was in fact collusive and fraudulent, and in violation of said law and the limitations thereof.

16. Defendant avers that said application, approved as aforesaid, was the basis of a pretended indemnity school land selection or location by the State locating agent for the land claimed and now owned by this defendant, which selection or location was illegal and void, and conferred no title upon said Squires or upon the plaintiff or any other person or persons whomsoever by reason of the facts herein set forth.

14 17. Defendant further avers that in satisfaction of said pretended illegal and fraudulent application and selection or location the Commissioner of the General Land Office of the United States, claiming to be acting under the provisions of the act of Congress of March 3d, 1853, and the 6th section of the act of Congress of July 23d, 1866, amendatory thereof, erroneously, illegally, and without authority, and as defendant believes, inadvertently and by mistake, listed and certified said land to the State of California, which list was erroneously and illegally, and as defendant believes, by mistake, approved by the Secretary of the Interior.

18. That the said pretended location or selection in the name of the State or by the State of California of said land in 1868 was illegal and void, and the act of Congress of March 3d, 1853, or any amendments thereof, gave no force or effect to said location or selection, and the approval of the list of said land as aforesaid conveyed no right, title, claim, or interest therein to the State.

19. That the act of the Commissioner of the United States General Land Office in certifying or listing said lands to the State of California was without authority, irregular, illegal, and ineffectual to vest in said State any right, title, claim, or interest therein or thereto.

15 20. And for a further answer and defense said defendant alleges that said location and selection of the land as aforesaid, and the plaintiff's claim of title at the time aforesaid in said complaint are illegal and void, inasmuch as said location or selection was made in lieu of a part of a certain 36th section, which was at the date of said location and still is surveyed land, and was and is now the property of the State of California, upon which there was not then nor is there now any claim of pre-emption or homestead, and that the United States surveyor general for the State of California never furnished the State locating agent or any of the State authorities with a list of said 36th section, or any part thereof, in any way as a basis of selection or location, or at all or in any way certified that the same was covered or in any way lost to the State.

21. That the plaintiff's claim of title to said land at the date of said bond through certain mesne conveyances, to wit, from E. W. Squires to J. R. Toberman, October 20th, 1873, and from J. R. Toberman to Nathan Fletcher, plaintiff herein, December 5th, 1873, and said patent issued to said Squires March 31st, 1873, is null and void. That the State had no title which it could convey to said Squires from whom said mesne conveyances descended.

16 22. Said defendant for a further answer and defense alleges

that on the former trial of the issues involved in this cause judgment was rendered by this hon. court in favor of defendant and against the plaintiff, which judgment, on appeal by said plaintiff, was reversed, and said cause remanded for new trial; that the remittitur was duly filed herein on the 5th day of November, 1878, and said cause was on that day placed on the calendar; that subsequent thereto, to wit, on the 13th day of December, 1878, defendant made a written tender to plaintiff of his bond and the possession of the land described therein, and in said complaint, and also an accounting for the rents and profits of said land since said 20th day of December, 1875, to the 20th day of December, 1878, at one dollar and twenty-five cents per acre per annum, said accounting and tender thereof being in the sum of seventy-five dollars U. S. gold coin, and demanded at the same time the repayment of the sum of $500, paid by defendant to plaintiff in U. S. gold coin on the said 20th day of December, 1875, with interest thereon at the rate of ten per cent. per annum, and did then and there demand a rescission of the contract between said plaintiff and defendant, as will fully appear by the said written tender, etc., on file with the papers in this cause.

That plaintiff refused to accept said tender as aforesaid, and still refuses the same. That plaintiff refused to accept said ac-
17 counting for said rents and profits, and still refuses, notwithstanding, as defendant is informed and believes, said sum is the full value of said rents and profits for said time.

That said plaintiff refused to pay to said defendant the said sum demanded, and still refuses to repay the same.

That said plaintiff did not consent to a rescission of said contract, and that defendant files herewith said bond and tenders the same to said plaintiff, and the possession of said land and the said rents and profits upon the payment to defendant of said $500 and legal interest since said Dec. 20th, 1875.

23. Defendant further alleges that said plaintiff is indebted to him in the sum of five hundred dollars gold coin, with legal interest thereon since said 20th day of December, 1875, the same being the sum received from defendant by said plaintiff under said representations of title aforesaid, and that the same is justly and equitably due defendant, and that the same has never been paid to defendant, nor any part thereof.

Wherefore defendant prays that said claim of title and patent be decreed to be void and of no effect; that the same be directed to be cancelled; that plaintiff be forever enjoined from asserting any title to said land and premises under and by virtue thereof, and
18 that the contract between plaintiff and defendant be rescinded, and that defendant have and recover from plaintiff the sum of five hundred dollars gold coin, with legal interest in like gold coin since the 20th day of ———, 1875, and for such other and further relief as may be just and right, together with his costs in the suit expended, and for a separate verdict and judgment in his behalf.

J. W. STUMP,
Attorney for Defendant.

Motion to Strike Out and Demurrer.

Title of Court and Cause.

Now comes the plaintiff in the above-entitled action and moves the court to strike out all that part of defendant's answer included in sections VIII to section XXII, on the grounds that all the facts therein alleged are irrelevant and redundant and matters of evidence and constitute no defense to the cause of action alleged in the complaint.

And said plaintiff also appears and demurs to the cross-complaint of defendant filed herein, and for grounds of demurrer alleges:

That said cross-complaint does not state facts sufficient to constitute a cause of action.

JOHN D. BICKNELL,
Attorney for Plaintiff.

19 *Minutes of Court, May 21st, 1879.*

Title of Court and Cause.

Motion to strike out portions of answer denied. Demurrer to cross-complaint sustained; five days to amend.

Findings.

Title of Court and Cause.

The above-entitled action came on regularly for hearing and trial on the thirteenth day of June, A. D. 1879, J. D. Bicknell, Esq., appearing as counsel for the plaintiff, and J. W. Stump, Esq., as counsel for defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the said action was tried by the court sitting without a jury, whereupon witnesses were duly examined on behalf of the plaintiff and defendant, and documentary evidence being also introduced by both parties, and the evidence being closed, and thereupon, after hearing arguments of counsel for the respective parties, the cause was submitted to the court for consideration and decision; and after due deliberation the court finds the following as the facts of the case, to wit:

20 1.

That the Rancho Sausal Redondo was granted to Antonio Ygnacio Abila May 20th, 1837, and was duly confirmed by the board of land commissioners June 10th, 1855, and the land involved in this action was within the claimed limits, and claimed by the grantees until October 31st, 1871. That in February, 1868, the lines of a survey of said grant were run in the field by U. S. Deputy Surveyor Hansen; that the grantees of said rancho protested against this survey, and another was made—the former being recalled—in July of the same year, by order of the U. S. Surveyor General, by Deputy Thompson. This survey embraced the land in question, and was duly approved by U. S. Surveyor General; that these surveys came up regularly on appeal before the Commissioner of the General

Land Office and the Secretary of the Interior of the United States, and were passed upon by said officers; that on the 31st day of October, 1871, the Secretary of the Interior rejected the survey of July, 1868, of said Rancho Sausal Redondo; that the survey of February, 1868, with slight modifications, was approved by the Commissioner of the Goneral Land Office March 22d, 1875.

2.

That about the 6th day of March, 1868, one Elmore W.
21 Squires made application to purchase the land in question from the State of California; that said application purported to have been made under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved March 27th, 1863, which application was not signed by said E. W. Squires or any other person. That said application thus made was of the date, numbered and accepted and filed, and selection and location made for said land in lieu of a part of a 36th section, claimed to be within a Mexican or Spanish grant, the final survey of which was made, and the certificate of purchase and patent is issued as follows:

Applicant, Elmore W. Squires.

No. of application, 913.

Date of application, March 6th, 1868.

Date of acceptance by State locating agent, April 20th, 1868.

Location made April 22d, 1868.

When filed with the surveyor general, June 12th, 1868.

Description, S. ½ of N. W. ¼ and N. ½ of S. W. ¼ sec. 32, T. 2 S., R. 13 W., San Bernardino meridian.

Taken in lieu of S. E. ¼ section 36, T. 4 S., R. 4 W., San Bernardino meridian.

To whom certificate and patent issued from State, Elmore W. Squires.

22 That said application was not accompanied by an affidavit of three disinterested persons stating, among other things, that said applicant was a resident of the State and that the land was unoccupied by any person except the applicant, as required by said act of April 27th, 1863.

That said applicant omitted and neglected to file in the office of the county recorder of Los Angeles county, where said land is situated, a description of the land applied for with a certificate of the oath or affirmation endorsed thereon as required by the 29th section of said act of April 27th, 1863.

That plats including said land purporting to be township plats were made and filed for the first time in the U. S. land office at San Francisco April 22d, 1868, the said survey having been approved by the U. S. Surveyor General March, 1868; that said plats were recalled by the U. S. Surveyor General May 26th, 1868.

3.

That by reason of said application Leandro Ransond, State locating agent of the State of California, on said 22d day of April, 1868,

pretending to act under and by virtue of the laws of said State, and in part satisfaction of the grant by the United States to said State of the 16th and 36th sections of land in said State for school
23 purposes, or other lands in lieu thereof, under an act of Congress approved March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," and of an act of Congress approved July 23d, 1866, entitled "An act to quiet land titles in California," selected and located the land described in said application for the State of California. That the selection and location were identical with the said application in number, in description of land applied for, in the 36th section used as the basis of said selection and location, and that said acceptance, selection, and location were collusive and fraudulent. That the United States surveyor general for the State of California never furnished the State authorities with a list including the said 36th section or any part thereof used by said State locating agent in said selection and location as a basis of selection as required by section 6 of said act of Congress, approved July 23d, 1866.

That thereafter by reason of said application, selection, and location, to wit, on the 23d day of November, 1871, and long prior to the lapse of the 90 days after the filing of the township plats including said land in the U. S. district land office, the Commissioner of the U. S. General Land Office, and the Secretary of the In-
24 terior, inadvertently and by mistake, certified and listed said land to the State of California, and that the list was identical with said application, selection, and location, in number, description of land selected and in the fraction of the 36th section used as a basis of said selection and location, and that said land embraced in said list was not of the character contemplated by any act of Congress or intended to be granted thereby.

4.

That the township plat including said land was on the 21st day of November, 1871, filed for the first time in the United States district land office of Los Angeles.

5.

That at the time of making said application and selection of the S. E. ¼ of sec. 36, T. 4 S., R. 4 W., S. B. M., was and has been ever since, and is now in place, and is the property of the State of California, and has never been under the claim of any confirmed and finally surveyed Mexican or Spanish grant.

6.

That the defendant was in possession of the land claimed by him, and did settle thereon and take possession thereof on the date and did file his declaratory statement upon said land by tendering
25 the same in due form, by tendering and depositing the same with the register and receiver of the proper U. S. district land

office, together with all legal fees therefor, on the date, and did tender full and complete proof of his settlement, improvements, and full compliances with the pre-emption laws of the United States, and tendered the full Government price therefor to said register and receiver, with all legal fees and commissions, and requested to be allowed, and offered to make, entry of said land at said land office as follows, to wit:

Name—B. W. Mower.

Date of settlement—March 12th, 1876.

Description of land—S. ½ of N. W. ¼ and N. ½ of S. W. ¼ section 32, T. 2 S., R. 13 W., S. B. M.

Date of tendering proof and request to make entry—December 13th, 1876.

7.

That said defendant was and is a duly qualified pre-emption settler and fully entitled to the privileges of the pre-emption laws of the United States, and settled upon said tract of land in good faith as such settler, and performed all acts required by said pre-emption laws to entitle a person to pre-empt public land, and was at the time of the trial thereof in possession of the said tract claimed by him aforesaid. That on the respective dates mentioned in the 6th finding above said defendant made and tendered full and complete proofs of his qualifications and his settlement and his improvements on said land to the register and receiver of said U. S. district land office, together with full Government price therefor, with all legal fees and commissions, and requested that he be permitted to enter said land at the said land office under said pre-emption laws, and that said register and receiver refused to approve the claim of said defendant and refused to permit him to enter said land under said pre-emption laws, and refused to receive the purchase price, and still so refuse.

26

That said defendant duly appealed from the said action of the register and receiver, and that this said claim is now pending before the Commissioner of the U. S. General Land Office.

8.

That the payment of money by defendant and the execution and delivery of the note were done and received upon the representations of plaintiff made to defendant, that said plaintiff was seized in fee of said land so agreed to be conveyed. That defendant's acts, and all of them, were performed in reliance upon the truth of said representations; that said representations were not true; that they were calculated to deceive and to defraud said defendant, and that he was thereby deceived and defrauded; that there was and is an entire failure of the consideration for said note; that said land never was in fee in said plaintiff at, or at any time prior to, the execution and delivery of said note and the bond for deed.

27

9.

That defendant made a good and sufficient tender of the rents and profits of said twenty acres of land; that plaintiff did not specify any objection to the same either in kind or amount of money, but acknowledged the same to be good and sufficient; that defendant also made a tender of the bond of plaintiff; that defendant demanded a rescission of the contract for the purchase of said land described in said bond; that defendant also demanded the repayment of the $500 paid by him to plaintiff, and legal interest thereon since the date of said note and bond; that plaintiff refused to accept said tender and refused to rescind said contract and to repay said sum of $500 with interest.

As conclusions of law from the foregoing facts the court finds:

1.

That no portion of said land thus included within the boundaries of the exterior limits of the private grant, to wit, the Rancho Sausal Redondo, was public land within the meaning of the acts of
28 Congress granting lands to the State of California as school lands, or as State indemnity lands, until the 31st day of October, 1871, the date said claim covering them was finally decided to be invalid, and the whole of said land was thus excluded from any mode of acquirement. That said land was not in condition to be applied for or acquired by individuals or selected by the State.

2.

That the defendant is in such privity with the United States, the paramount source of title, as enables him to attack the patent issued by the State for the land claimed by defendant and upon which plaintiff rests his title in an action at law or in equity.

3.

That the selection of said land was void as having been made without authority of law, and being void the State had no title which it could convey to Elmore W. Squires; that said land was not intended to be granted by an act of Congress, and the listing of said land to the State by the Commissioner of the General Land Office was null and void and the patent from the State for said land is void, and the plaintiff has no title to said land, or any part thereof.

29 4.

That an invalid State selection is no bar to the rights of pre-emptors and that the tender of proof and offer of payment by the defendant for said land places him in the same relation as if said defendant had been permitted by the land officers to do what in this respect was offered to be done.

5.

That the defendant is entitled to have and recover from the plain-

tiff the sum of five hundred dollars, gold coin, paid by him to said plaintiff on the 20th day of December, 1875, and legal interest thereon since said date.

Let judgment be entered accordingly as prayed by defendant.

SEPULVEDA, *Judge*

Judgment.

Title of Court and Cause.

This cause came on regularly for trial on the thirteenth day of June, A. D. 1879; J. D. Bicknell, Esq., appearing as counsel for plaintiff, and J. W. Stump, Esq., for defendant. A trial by
30 jury having been expressly waived by the respective parties, the cause was tried before the court without a jury, whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined and documentary evidence introduced by respective parties, and the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings and decision in writing, and orders that judgment be entered herein in favor of defendant in accordance therewith.

Wherefore, by reason of the law and findings aforesaid, it is ordered, adjudged and decreed that plaintiff has no title to the land; that he be, and he is hereby, enjoined from asserting any title to said land claimed by defendant, to wit, the S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of sec. 32, T. 2 S., R. 13 W., S. B. M., and that defendant have and recover from plaintiff the sum of five hundred dollars, gold coin, with legal interest thereon in gold coin since the 20th day of December, 1875; and that defendant have his costs and disbursements incurred in this action, amounting to the sum of $82.20.

SEPULVEDA, *Judge.*

Filed September 22, 1879.

31 *Statement on Motion for a New Trial.*

Title of Court and Cause.

Be it remembered that this cause came on regularly for trial on the — day of June, 1879, in the above-mentioned court, a jury being expressly waived the same was tried before the court. And the defendant, to sustain the issues on his part and to show that plaintiff was not the owner of the land at the time he agreed to convey the same or for which the note was given mentioned in the complaint, offered in evidence certain documents and witnesses to prove that at the time the land mentioned in the bond was selected by the State, the owners of the Rancho Sausal Redondo claimed that said land was within the exterior limits of said rancho, which was granted to Abila May 20th, 1837, and was so claimed until Nov. 21st, 1871, and that the patent of said rancho was issued March 22d, 1875.

To the introduction of which the plaintiff objected, upon the grounds that the same was irrelevant and immaterial, and upon the further grounds that the defendant cannot in this action offer any proof that

the plaintiff had no title at the time he executed his bond until he had tendered a reconveyance of the land and offered to account for the rents and profits and tendered the costs in this action.

32 Which objection was by the court overruled, and the plaintiff then and there excepted to said ruling.

Plaintiff then stipulated, subject to the above objection, that the Rancho Sausal Redondo was granted as stated in the offer and patented, and that the witnesses would testify that the owners of said rancho claimed that said land formed a part of said grant until 1871.

Defendant offered in evidence certain documents and witnesses to prove that defendant had offered to rescind the agreement and tendered the possession of the land described in the bond, and also the bond, and offered to account for the rents and profits thereof.

Whereupon it was stipulated that the facts were that the attorney of the defendant on the 13th day of December, 1878, served upon attorney for plaintiff an offer in writing to deliver the possession of said land and to deliver up the bond, and also tendered in gold coin $75.00, the same being for rents at the rate of $1.25 per acre for the 20 acres for three years, and demanded that the contract be rescinded and that plaintiff refund the money paid by defendant. Defendant did not at the time tender or offer to pay the costs that had then accrued in this action, or any part thereof, and said attorney for plaintiff refused to accept said tender, and gave no reasons for his refusal.

33 Defendant then offered in evidence a certified copy of the application of E. W. Squires to locate certain lands, dated San Francisco, March 6th, 1868, together with the affidavits of three witnesses and certificate of acceptance of Leander Ransom, State locating agent, and certificate of Robert Gardner, surveyor general, approving said location; also affidavit of said E. W. Squires accompanying said application for location, together with the endorsements thereon; together with the affidavit filed in the county recorder's office of Los Angeles county. To the introduction of which counsel for plaintiff objected, on the ground that the same was irrelevant and immaterial, and upon the further ground that the defendant in this action, claiming the land as a pre-emptor under the laws of the United States, cannot enquire into or attack any proceedings whereby the State has disposed of said lands; which objection was by the court overruled, and to which ruling the plaintiff then and there excepted.

The documents above offered were then read in evidence, and are in words and figures following, to wit:

34 *Grant of the 16th and 36th Sections for School Purposes.*

STATE OF CALIFORNIA, LOCATING AGENT'S OFFICE.

San Francisco Land District. Location No. 913.

I hereby certify that in accordance with the provisions of an act entitled "An act to provide for the sale of certain lands belonging

to the State," approved April 27th, 1863, and with the instructions of the surveyor general, I have located as a portion of the school lands one hundred and sixty acres of public land in the county of Los Angeles, at the request and for the use of Elmore W. Squires.

Said land is described as follows: S. ½ of N. W. ¼ and N. ½ of S. W. ¼ of sec. 32, T. 2 S., R. 13 W., San Bernardino meridian, taken in lieu of S. E. ¼ of sec. 36, T. 4 S., R. 4 W., San Bernardino meridian.

This location has been made by me by filing an application for the same in the manner and for the benefit of the State of California, at the U. S. land office for the San Francisco district, in the city of San Francisco, and with the consent of James W. Shanklin, register of said district, bearing date the 22d day of April, A. D. 1868, and the same is entered and numbered upon my register of locations.

35 Witness my hand at office in San Francisco, this 22d day of April, 1868.

LEANDER RANSOM,
State Locating Agent for the San Francisco Land District.

SURVEYOR GENERAL'S OFFICE,
SACRAMENTO, *22d day of Dec.*, 1871.

The above location is hereby approved and the treasurer of Los Angeles county shall receive in payment therefor, from Elmore W. Squires, forty dollars and thirty-five cents ($40.35) *dollars* within fifty days from the record of the surveyor general's approval, being twenty per cent of the purchase-money and one year's interest on the balance in advance at the rate of ten per cent. per annum from the date of location in the locating agent's office.

BOBERT GARDNER,
Surveyor General

Affidavit

To accompany applications to purchase State lands, as required by act of Legislature passed April 27th, 1863.

I do solemnly swear that I will support, protect, and defend the Constitution and Government of the United States against all enemies, whether domestic or foreign; that I will bear true faith,

36 allegiance, and loyalty to the said Constitution and Government, any ordinance or law of any State Convention or Legislature, or any rule or obligation of any society or association or any decree or order from any source whatsoever to the contrary notwithstanding, and that I will support the constitution of the State of California; and further, that I do this with a full determination, pledge and purpose, without any mental reservation or evasion whatsoever, and that this oath is not taken for the purpose of acquiring title to, interest in, or possession of any land in order that such title, interest, or possession may be transferred to any person or persons to evade the provisions of any law of the State of California, or any regulation of the General Land Office at Washington.

ELMORE W. SQUIRES.

Subscribed and sworn to before me, this — day of ——, 186–.
GEORGE J. CLARKE,
Notary Public.

I certify the above affidavit and indorsed description of land to be true copies of the originals on file in the office of the county recorder.

T. D. MOTT,
County Recorder of Los Angeles County.
By J. W. GILLETTE, *Deputy.*

37 (Affidavit indorsed as follows:)

Affidavit and description of land to accompany the application of Elmore W. Squires, Los Angeles county.
No. 913.
Township 2 south, range 13 west, section 32; south ½ of northwest ¼, N. ½ of S. W. ¼, containing 160 acres.
Located March 6, 1868.
Surveyed ——— 186–.
By U. S. surveyor general.

Grant of the 16th and 36th Sections for School Purposes.

Application for Location Under the State. Location No. 913.

SAN FRANCISCO LAND DISTRICT,
SAN FRANCISCO, *March* 6, 1868.

To State Locating Agent:

I, Elmore W. Squires, of Los Angeles county, State of California, do hereby apply, under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, to purchase and locate the following described land in Los Angeles county: The south one-half of the northwest quarter and north half of southwest quarter of section thirty-two (32),
38 township two (2) south, of range thirteen (13) west, of San Bernardino meridian, containing one hundred and sixty acres, according to the returns of the U. S. Surveyor General, and which I agree to accept in lieu of the full amount of 160 acres, for which I agree to pay to the State of California one dollar and twenty-five cents per acre, in the following manner, viz: Twenty per cent. of the purchase-money, together with interest on the balance at the rate of ten per cent. per annum, in advance, from the date of location in the locating agent's office.

This location has been made by me in lieu of S. E. ¼ of sec. 36, T. 4 S., R. 4 W., San Bernardino meridian, which is included in a private grant.

Affidavit for Location.

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

Location No. ——, San Francisco Land District.

I Elmore W. Squires, of Los Angeles county, State of California,

being duly sworn, depose and say: That I am a citizen of the United States and a resident of the State of California, of lawful age; that I am an applicant for the purchase and location of the above described lands; that the same are unoccupied by any person other than myself, and that, to the best of my knowledge and belief, there is no valid claim existing upon the lands so described adverse to the claim I hold and apply to be located, and that there is no improvement of any description on said land other than my own.

39

Witness my hand.

E. W. SQUIRES.

Sworn and subscribed to before me, this 6th day of March, A. D. 1868.

GEORGE J. CLARKE,
Notary Public.

We, J. Q. A. Stanley, W. S. Rosecrans and N. C. Larrabee, of Los Angeles county, State of California, being duly sworn, each for himself, deposes and says that he is acquainted with the lands described in the above application and sought to be located by the above-named Elmore W. Squires; that there is no valid claim existing upon the land so described adverse to the claim above named, nor any improvements other than those owned by the said applicant, to the best of his knowledge and belief; and that he neither has nor expects to have any interest, directly or indirectly, in the claim so desired to be located by the said Elmore W. Squires.

Witness our hands.

J. Q. A. STANLEY.
NORTON C. LARRABEE.
W. S. ROSECRANS.

40

Sworn to and subscribed before me, this 6th day of March, A. D. 1868.

GEORGE J. CLARKE,
Notary Public.

I, Leander Ransom, State locating agent for the San Francisco land district, do hereby accept the above offer under the following conditions: That if such location be made and approved by the United States, it shall be for the use and benefit of the applicant on his complying with all the conditions and provisions of the act for the location and sale of lands belonging to the State, approved April 27th, 1863.

LEANDER RANSOM,
Locating Agent.

Office of locating agent, San Francisco, April 20, 1878.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the annexed and foregoing is a copy of a document on file in my office; that said copy has been compared by

me with the original, and is a correct transcript therefrom and of the whole of such original.

41 In witness whereof, I have hereunto set my hand and affixed my official seal, this 15th day of August, A. D. 1877.

[SEAL.] WM. MINNIS,
Register State Land Office.
By DUNCAN BEAUMONT, *Deputy.*

(Indorsed.)

Cert. 233 issued July 9, 1872.
Patented March 31, 1873.
Grant of the 16th and 36th sections for school purposes.
San Francisco land district.
Location No. 1238.
San Bernardino meridian.
Township No. 2 south, range No. 13 west.
Section 32—south ½ of northwest ¼, north ½ of southwest quarter.
Taken in lieu of southeast ¼ Sec. 36, in township No. 4 S., range No 4 W., San Bernardino meridian.
Containing 160 acres in lieu of 160 acres.
Located for Elmore W. Squires by Leander Ransom, locating agent.
Received and filed 12th June, 1868.
Approved 22d December, 1871.

ROBERT GARDINER,
Surveyor General.

(Defendant's Exhibit 5.)
Filed February 28th, 1878.

42 (Copy.)

Affidavit

To accompany applications to purchase State lands, as required by act of Legislature passed April 27th, 1863.

I do solemnly swear that I will support, protect, and defend the Constitution and Government of the United States against all enemies, whether domestic or foreign; that I will bear true faith, allegiance, and loyalty to the said Constitution and Government, any ordinance or law of any State Convention or Legislature, or any rule or obligation of any society or association or any decree or order from any source whatsoever to the contrary nothwithstanding, and that I will support the constitution of the State of California; and further, that I do this with a full determination, pledge, and purpose, without any mental reservation or evasion whatsoever, and that this oath is not taken for the purpose of acquiring title to, interest in, or possession of any land in order that such title, interest, or possession may be transferred to any person or persons to enable such person or persons to evade the provisions of any law of the

State of California, or any regulation of the General Land Office at Washington.

ELMORE W. SQUIRES.

43 Subscribed and sworn to before me, this 6th day of March, 1868.

GEORGE J. CLARKE,
Notary Public.

NOTE.—This being subscribed and sworn to by the applicant is to be filed with county recorder.

(Indorsed.)

Affidavit and description accompanying the application.
Elmore W. Squires, Los Angeles county.
No. —.
Township 2 and 3, range 13, section 32 and 5, containing 160 acres.
Located March 7th, 1868.
Surveyed March 1, 1868.
By U. S. Surveyor General.
Defendant's Exhibit 4.
Filed March 7, A. D. 1868, at 3 hrs. 58 mins. p. m.

T. D. MOTT,
County Recorder,
By J. W. GILLETTE, *Deputy.*

Filed Feb. 28, 1878.

Defendant then offered in evidence the copy of certificate of William Minis, surveyor general, showing that no lists are on file in his said office, including the selection hereinbefore referred to.

44 To the introduction of which plaintiff objected upon the same grounds as hereinbefore stated, and upon the further ground that the same is incompetent with the same rulings by the court, and the same exception by the plaintiff, whereupon said certificate was read in evidence and is in words and figures following:

The list offered included among other sections, sec. 36, township 4 S., range 4 W., S. B. M., to which list was attached the following certificate:

OFFICE OF SURVEYOR GENERAL,
SACRAMENTO, CALIFORNIA.

I hereby certify that I have made diligent search therein, and that the records of this office do not show that the United States surveyor general for the State of Cafifornia, ever furnished the State authorities with a list or lists including any of the above-named sections or any part thereof as a basis of selection of other land in lieu thereof.

Witness my hand and the seal of this office, this 25th day of May, A. D. 1877.

[SEAL.] WM. MINIS,
Surveyor General.

Defendant's Exhibit 8.
Filed February 28, 1878.

Defendant then offered in evidence a copy of the certificate of purchase issued by the State of California to E. W. Squires,
45 said patent dated October 20th, 1875, and both of which are in the usual form.

Counsel for defendant then offered in evidence the list of the United States land office, showing that said land was listed by the General Government to the State of California November 14, 1871.

Alfred James was then called on the part of the defendant, and after being duly sworn, testified substantially as follows:

(It was admitted that Mr. James is register of the United States Land Office.) Section 36, T. 4 S., R. 4 W., S. B. M., is in place and belongs to the State of California, as appears from the records of my office, and there is no homestead or pre-emption claim thereon.

On cross-examination, the witness testified substantially that that T. 4 S., R. 4 W., was surveyed in 1856, in the field, and approved in 1857; T. 2 S., R. 13 W., was surveyed in February, 1868, survey approved April 1st, 1868, and township plat filed in the United States Land Office in San Francisco April 22d, 1868.

The land in controversy being then in the San Francisco Land District, said land was public land, and has been disposed of as public land by the Government of the United States.

46 H. C. AUSTIN was then called as a witness for the defendant, and being duly sworn testified substantially as follows:

Counsel for defendant asked the witness the following question: State whether the land claimed by defendant, S½ of NW¼ and N½ of SW¼ of Sec. 32, T. 2 S., R. 13 W., was ever claimed, in your knowledge, by the grantees of the Sausal Redondo grant; if so, how late?

To which question plaintiff objected, on the grounds that the same was irrelevant, immaterial and incompetent; which objection was by the court overruled, to which ruling plaintiff then and there in due form of law excepted.

To which question witness answered that said lands were claimed as late as 1872, under the act of 1866, as land excluded from the final survey of the Ranch Sausal Redondo.

Counsel for defendant then offered as evidence the patent of the Sausal Redondo Ranch, together with the final survey.

To the introduction of which counsel for plaintiff objected, on the grounds that the same was irrelevant and immaterial.

47 Which objection was by the court overruled, to which ruling plaintiff then and there excepted, and said patent received in evidence.

It was stipulated between the parties that that Sausal Redondo is

a valid Mexican grant, and that a patent has been issued thereon. Said patent is dated 22d day of March, 1875, and does not include the land described in the complaint, or any of the land claimed by defendant as a pre-emptor.

Defendant then offered in evidence the map of the "larger survey," so called, of said Rancho Sausal Redondo.

To the introduction of which plaintiff objected, on the ground that the same is irrelevant, immaterial, and on the further ground that there is no evidence that said map represents any survey of said ranch, or that such a survey was ever made.

Which objection was by the court overruled, to which ruling plaintiff then and there excepted in due form of law, and said map was admitted as evidence, a copy of which said map is hereto attached and marked Exhibit —.

Defendant then offered in evidence copies of the decisions of the Secretary of the Interior and Commissioner of the General Land Office in regard to the rejection of said survey.

48 To which plaintiff objected upon the grounds that the same were irrelevant and immaterial, which objection was by the court overruled, to which ruling plaintiff excepted, and said decisions were then read in evidence, and contained the following facts:

1. That the Rancho Sausal Redondo was first surveyed by Hancock in 1858, and that this survey was never officially disapproved, and the claimants of the rancho were not notified of any action thereon. It was, however, supposed to become obsolete from length of time which elapsed since its execution.

2. Instructions were therefore issued directing Deputy Hansen to segregate the grant from the public lands, which was done in 1868, but was not submitted to this office for approval. The Surveyor General omitted compliance with the instructions of Commissioner's office, defining his duties under act of 1866, requiring him to give notice to the claimants.

3. The plats of Hansen's survey, filed in district land office, were recalled by the Surveyor General, and instructions issued for a survey of the rancho under act of 1864, which was made by Deputy Thompson in 1868.

49 *Opinion of Hon. C. C. Delano, Secretary of the Interior.*

DEPARTMENT OF JUSTICE,
OFFICE OF ASSISTANT ATTORNEY GENERAL,
WASHINGTON, *October* 23, 1871.

Case of the appeal commonly called Sausal Redondo.

Juan B. Alvarado, Governor *ad interim* of Alta, California, on petition of Antonio Ignacio Abila, granted him on the 20th of May, 1837, the tract of land known as Sausal Redondo.

A rude map accompanied the grant.

June 4th, 1846, Pio Pico, "constitutional Governor of the Department of California," reciting the fact that Antonio Ignacio Abila

had proven the said tract to belong to him, granted him said land. No juridical possession was ever given.

June 19th, 1855, the board of land commissioners confirmed Abila's claim to said land, "containing five square leagues."

The United States district court for the southern district of California, at its December term, 1856, confirmed the decision at the board of land commissioners, reciting the grant made by Alvarado May 20th, 1873, and locating the land in the present county of Los Angeles, and being within the boundaries of the map which
50 accompanies the original petition of Abila, reference being made to said original grant and said map. Said lands were not to exceed eleven square leagues. This decree became final by order of the Surveyor General. The first survey is said to have been made by Henry Hancock in 1858, embracing five leagues of land, which was rejected. At the instance of Gen. W. S. Rosecrans, who paid for the expense of the survey, the Surveyor General, purporting to act under the 8th section of the act of Congress of July 23, 1866, directed Geo. Hansen to segregate the grant to Abila from the public lands. This was done in February, 1868, the survey covering about five square leagues.

In the following May the owners of Sausal Redondo filed a protest against Hansen's survey, saying they had applied for an estimate of the survey they—(which the Surveyor General says never reached him): that no notice of the Hansen survey had been given to the parties in interest, as had been ordered by the Commissioner; that the segregation did not conform to the decree.

In response to this protest, Surveyor General Upson recalled the plats of Hansen's survey from the local office May 26th, 1868, and directed a survey be made under the act of 1864, which was done by G. H. Thompson in July, 1868, embracing nearly eleven square leagues.

51 The consideration of these two surveys came regularly before the Commissioner and Secretary of the Interior, and were passed upon by said officers, and the Thompson survey was disapproved by the Surveyor General and the Commissioner of the General Land Office.

The "rude map" referred to in Abila's original petition, and mentioned in the decree of the court, gives the north boundary by lands belonging to the city of Los Angeles, on the south by Rancho Gertrudes, on the west by Rancho Ballona, on the east by the Rancho Las Cuerbas. According to this, it is said the map measures five square leagues.

Alvardo's grant mentioned no quantity, but Pico limited the quantity to four square leagues; but Pico's grant is not mentioned in the decree of the district court.

The Hansen survey does substantial justice between the parties, and was recommended for approval, and the township plats made by him directed to be restored.

(Signed) C. C. DELANO, *Secretary.*

Defendant then offered in evidence the order of the surveyor

general withdrawing the township plat which includes the lands in controversy.

52 To the introduction of which plaintiff objected, on the grounds that the same was irrevelant and immaterial, which objection was by the court overruled, and plaintiff then and there excepted to said ruling in due form.

Said order was then admitted as evidence, and is as follows, to wit:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL., *May* 26, 1868.

J W. SHANKLIN, Esq.,
Register U. S. Land Office, San Francisco.

SIR: You are respecfully requested to return to this office the plats of townships 2 S. and 3 S., ranges 13 and 14 W., San Bernardino meridian, filed in your office April 22d, 1868.

Very respectfully, your obedient servant,

L. UPSON,
U. S. Surveyor General.

Endorsed: Filed May 28th, 1868, and maps returned to Surveyor General's office.

I certify the above foregoing to be a full, true, and correct copy of the original letter, with the endorsements thereon, on file in my office.

WM. R. WHEATON, *Register.*

U. S. Land Office, San Francisco, California, February 6th, 1877.

53 Defendant then offered in evidence the township plat, which includes the land in question, for the purpose of showing that the same was withdrawn May 26th, 1868, and not entered until November 21st, 1871, and it appears therefrom that said plat was suspended January, 1872, and restored June 15th, 1872.

The defendant was introduced as a witness, and testified substantially as follows:

I entered upon the land claimed by me as a pre-emptor in December, 1875. I entered under an agreement to purchase 20 acres of Fletcher, the plaintiff. In the spring of 1876 I found that Fletcher had no title to the land, and I then claimed the 160 acres as a pre-emptor. At the time I purchased, Kuffel, who was the agent of Fletcher, represented to me that the title was a perfect title, and I bought believing the title good. I offered to file a declaratory statement in the U. S. Land Office in spring of 1876, and tendered the officers their fees. They refused to receive the fees or file the declaratory statement, claiming that the land had been listed to the State of California, and was not open to pre-emption or homestead entry.

In the fall of 1876, more than six months after my tender to file, I went to the land office with my witnesses and tendered final proof

and payment as required by law, which was also refused.

54 I appealed to the Commissioner of the General Land Office from the refusal to file and refusal to receive the final proof and payment, which is still pending, as far as I know.

I resided on the 20 acres, claiming the 160 acres as a pre-emptor, until January, 1877, when I moved over into the dwelling-house, where I now reside.

It was stipulated that defendant would testify to all the facts necessary to constitute him a qualified pre-emptor under the laws of the United States.

Witness further testified that he had placed valuable improvements on the premises, and occupied the same continuously with his family ever since his entry.

On cross-examination witness testified that he first entered upon the lands under the agreement with plaintiff; that he moved into the house he now occupies in the first part of 1877. The house is on the eastern part of the 80, and the 20 acres is on the west. At the time he moved into the house the land was partially enclosed—about ten acres of bearing orchard. Most of the land had been cultivated. There were besides, dwelling-house, corrals, &c. I moved in a day or two after McCollum left. The land had been continuously occupied since I knew it by parties who held it under Fletcher until I entered.

55 I tendered $200 at land office in payment for the land.

J. C. McCollum was introduced as a witness and duly sworn, and testified in substance: That he resided on the east 60 acres of the 80 acres of which the 20 acres mentioned formed a part, for some time previous to January, 1877; that he had purchased the land of Fletcher and executed to him a mortgage on the land; that in January, 1877, he became satisfied that he had no title to the land by the deed from Fletcher and he did not intend to spend any more money on it, and he abandoned his interest in the land and moved off and Mower moved on soon after. Mower knew that he was going to leave and he made no objection to Mower's moving on the land.

Defendant then rested his case.

Plaintiff, to sustain the issues on his part, offered and read in evidence a letter from L. Upson, U. S. Surveyor General, directed to Geo. Hansen, deputy, dated Feb. 7th, 1868, together with instructions under same date relating to the survey of the Rancho Sausal Redondo.

It was stipulated that the evidence of George Hansen, as taken in the case of O'Connor *vs.* Frasher, *et al.*, should be received in this case, said Hansen's testimony being substantially:

56 That in the year 1868 he was deputy U. S. surveyor, and as such he surveyed the Rancho Sausal Redondo under instruction from the United States Surveyor General. That the following are the original instructions given by said Surveyor General, and under which witness surveyed said Ranch.

Plaintiff then read said instructions, which are as follows:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL., *February* 7, 1868.

SIR: With this I forward a contract for the subdivision of the township below designated, viz:

T'ps. 2 and 3 S., R. 13 W., and T'ps. 2 and 3 S., R. 14 W., San Bernardino meridian.

In making the survey of these townships you will set off within the boundaries of the latter the line of five square leagues, in satisfaction of the grant of Sausal Redondo, confirmed to A. Y. Abila, in accordance with the accompanying instructions and the 8th section of the act of Congress approved July 23d, 1866, entitled "An act to quiet land titles in California."

Very respectfully,

L. UPSON,
U. S. Surveyor General.

GEORGE HANSEN, Esq., *U. S. Deputy Surveyor, Los Angeles, Cal.*

57 U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *February 7th*, 1868.

SIR: Whereas, in the claim of Antonio Y. Abila to the tract of land hereinafter described, the United States district court for the southern district of California has affirmed the decision of the board of land commissioners, and notice is given by the Attorney General of the United States that no appeal will be further prosecuted therein, I have thought proper to appoint you my deputy in this special case, for the execution of the final survey thereof. The decree of court above referred to, confirming the land known by the name of Sausal Redondo and Guaspita, being the same lands granted by J. B. Alvarado, May 20, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanies his original petition to the Governor for the said lands, reference being had for more particular description to said original grant of said lands and the said map belonging thereto, filed in this cause and copied in said transcript.

Provided that the lands contained within said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity, and no more, within said boundaries; but, if
58 a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity.

The original grant in this case describes the land as follows:

1st. There is conceded to the citizen Antonio Yno. Abila the tract of land called "Sausal Redondo" and "Guaspita," which he actually occupies, &c., without prejudice to the pasture lands of the city as it has not marked out the commons ("ejidos.")

2d. That if the land to which reference is made in the foregoing article should be comprehended within the ("ejidos,") of which mention is made, the grantee shall be subject to pay the ground rent which is imposed on it.

A copy of the map referred to is herewith given you.

No application having been made for the survey of this rancho

within ten months after the passage of the act of Congress, approved July 23d, 1866, entitled "An act to settle land titles in California," you are hereby instructed to set off the same, as contemplated by said act. The map or diseño is, by the decree of the court, the governing paper; it contains, according to a scale thereon, about five square leagues. The petition to the board of land commissioners was for that quantity. The "Guaspita" is the por-
59 tion bordering on the "Ballona Rancho." You will retain three boundaries called for on the diseño, viz: The Bellona, Mar, and San Pedro, and after connecting the "Aguajida Centenella," in accordance with the views of the office, adopt the southern line thereof as the line of this rancho, and extend the eastern or closing line so far east as to embrace the old house of Abila, near the spring of Centenella.

Very respectfully,

L. UPSON,
U. S. Surveyor General.

To GEORGE HANSEN, Esq., *U. S. Deputy Surveyor.*

Witness testified that said instructions were received by him in the due course of his business as deputy U. S. surveyor, and that he surveyed said rancho under said instructions, and it was upon this survey the patent to said rancho was issued.

It was stipulated that the land claimed by defendant, as a preemptor, was, at the date of his entry and is now, within the limits of the withdrawal of the Southern Pacific R. R. Co.

Plaintiff then offered in evidence the township plat of T. 2 S., R. 13 W., S. B. M., which includes the land in controversy, with
60 all the entries and notes thereon, records of the U. S. land office.

It was stipulated between the parties that it appears upon the face of said plat that the township lines were run in July, 1853, and the section lines run in February, 1868; plat approved by Surveyor General April 1st, 1868, and was filed in the U. S. land office in San Francisco, in which district the land was then situate, April 22d, 1868, and refiled in land office at Los Angeles November 21st, 1871.

Plaintiff then offered in evidence List No. 1, records of U. S. land office.

And it was stipulated that said list, with the endorsements thereon, show that the Commissioner of the General Land Office approved said list November 23d, 1871, and the Secretary of the Interior signed and affirmed said list November 24th, 1871, and that the list and the certificate thereon are in usual form and purport to list the land in controversy to the State of California upon the face thereof.

Plaintiff then offered and read in evidence a patent from the State of California to E. W. Squires, dated March 31st, 1873, recorded in Book 1 of Patents, page 495 and '6, records of Los Angeles county. Said patent is in usual form and purports to convey to said Squires 160 acres of land including the land in controversy.

61 It was stipulated that Nathan Fletcher, the plaintiff, at the time he executed the bond to defendant, referred to in this

case, had acquired by mesne conveyances all the title of E. W. Squires conveyed to him by said patent.

Plaintiff introduced as a witness E. W. SQUIRES, who was duly sworn, and testified substantially as follows:

I took possession of the 80 acres, of which the 20 acres referred to form a part, in October, 1859, and commenced improving the same. I bought the 80 acres south about that time. In the fall I commenced ditching and fencing. In the spring of 1860 I planted about eight acres in trees (apple orchard) and built a house; planted 1,640 trees. I cultivated the land; put a fence around the whole tract, and cross-fences. I remained there until 1870, when I moved, but kept possession for two years longer. When I left there was a very good dwelling-house, frame barn, and fences. I considered the improvements worth $2,000.00. The revenue from the orchard alone was over six hundred dollars per year.

J. K. STUMP was introduced as a witness and duly sworn, and testified substantially as follows:

Have known the land mentioned since 1859. The land has been in possession of Squires, Thomas, Dull, and others
62 until the time the defendant entered. At the time Mower moved from the 20-acre tract purchased by him of Fletcher to the house now occupied by him there were fences on the east, north, and south lines—a pole fence; there was a dwelling-house, orchard, &c. The improvements were worth about $1,000. The 20-acre tract is worth for rent from $1.25 to $2.00 per acre.

Other witnesses testified to the same effect.

Whereupon plaintiff rested.

Plaintiff here assigns and specifies the errors of law committed by the court upon the trial of said cause, which were duly excepted to by plaintiff:

1st. The court erred in permitting the defendant to prove that the owners of the Rancho Sausal Redondo claimed the land in controversy to be within the exterior limits of said rancho at the time of the selection of the same, and in overruling the plaintiff's objection thereto, and especially erred in permitting the defendant to introduce any evidence tending to impeach the title of plaintiff until defendant had tendered a reconveyance of said land and accounting of rents and profits, and tendered the costs accrued in this action, for the reasons set forth in the objections made upon the trial as appears in above statement.

63 2d. The court erred in overruling the plaintiff's objections and admitting as evidence the certified copy of the application of E. W. Squires to locate and purchase certain lands including the land in controversy, and affidavits of witnesses thereto, and certificate of acceptance by State locating agent, and other certificates and affidavits attached to said application, for the reasons and upon the grounds set forth in plaintiff's objections thereto as set forth in the foregoing statement.

3d. The court erred in overruling the objections made by plaintiff and admitting as evidence the copy of list and certificate of Wm. Minis, surveyor general, purporting to show that certain lists are not now on file in his office as a record thereof, upon the grounds and for the reasons set forth in the plaintiff's objections thereto.

4th. The court erred in overruling the plaintiff's objections and permitting the witness, H. C. Austin, to testify as to the claims made by the owners of the Rancho Sausal Redondo as to the boundaries thereof, upon the grounds and for the reasons stated in the objections thereto as set forth in the foregoing statement.

5th. The court erred in admitting as evidence against the objections of plaintiff, the map of "large survey," or Thompson's
64 survey (so called) of the Rancho Sausal Redondo, for the reasons and upon the grounds stated in the objections thereto as set forth in the foregoing statement.

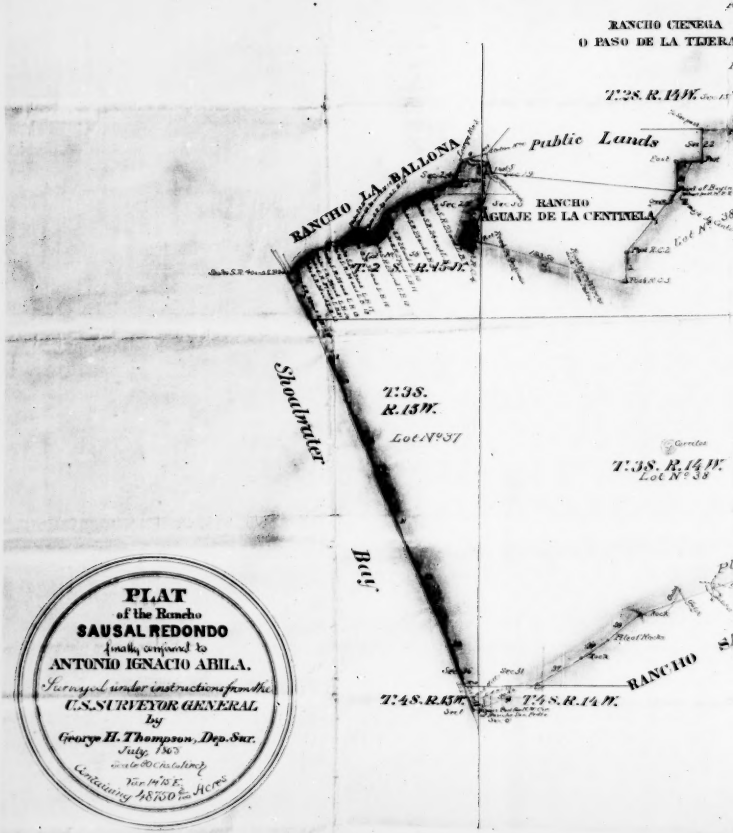
Plaintiff here particularly assigns and specifies wherein the evidence in this cause is insufficient to justify the findings and decision in this cause:

1st. Finding No. 2 is unsustained by the evidence and repugnant thereto in so far as it is there found that the application therein referred to was not signed by E. W. Squires or any other person, and in so far as it is therein found that said application was not accompanied by an affidavit of three disinterested persons stating that said land was unoccupied by any other person than said applicant, and in so far as it is therein found that said applicant omitted and neglected to file in the office of the county recorder of Los Angeles county, where said land is situated, a description of the land applied for, with a certificate of the oath endorsed thereon, as required by Section 29th of the act of April 27th, 1863; and in so far as it is therein found that the township plats were recalled May 26th, 1868.

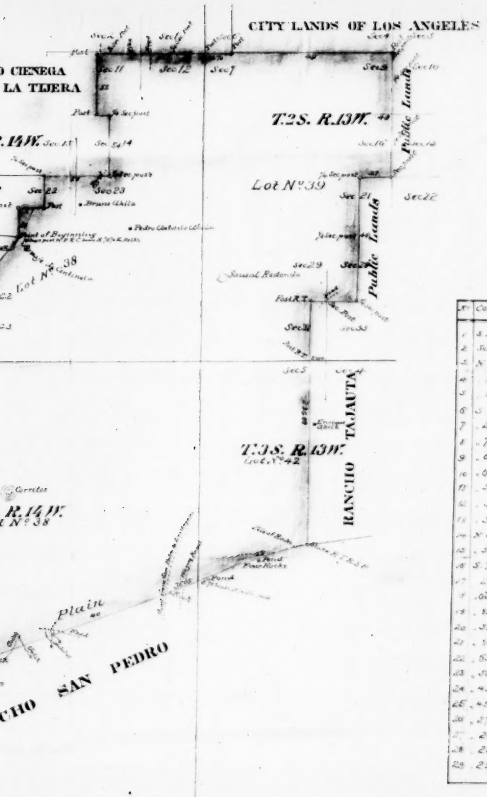
2d. Finding No. 3 is unsustained by the evidence and repugnant thereto in so far as it is therein found that the acceptance, selection, and location of said lands were collusive and fraudulent, and
65 in so far as it is therein found that the U. S. Surveyor General of California, never furnished the State authorities with a list including the 36th section used by the State as a basis of selection of the lands in controversy, and in so far as it is therein found that the listing of the lands to the State of California by the Commissioner of the General Land Office or Secretary of the Interior was inadvertent and by mistake; and in so far as it is therein found that the land was not of the character contemplated by any act of Congress or intended to be granted by said list.

3d. Finding No. 6 is wholly unsustained and repugnant to the evidence.

4th. Finding No. 7 is unsustained by the evidence and repugnant thereto in so far as it is therein found that defendant tendered the full Government price of said lands.



PLAT
of the Rancho
SAUSAL REDONDO
finally confirmed to
ANTONIO IGNACIO ABILA.
Surveyed under instructions from the
U.S. SURVEYOR GENERAL
by
George H. Thompson, Dep. Sur.
July. 1865
Variation 14°8 E.
Containing 18750 100 Acres

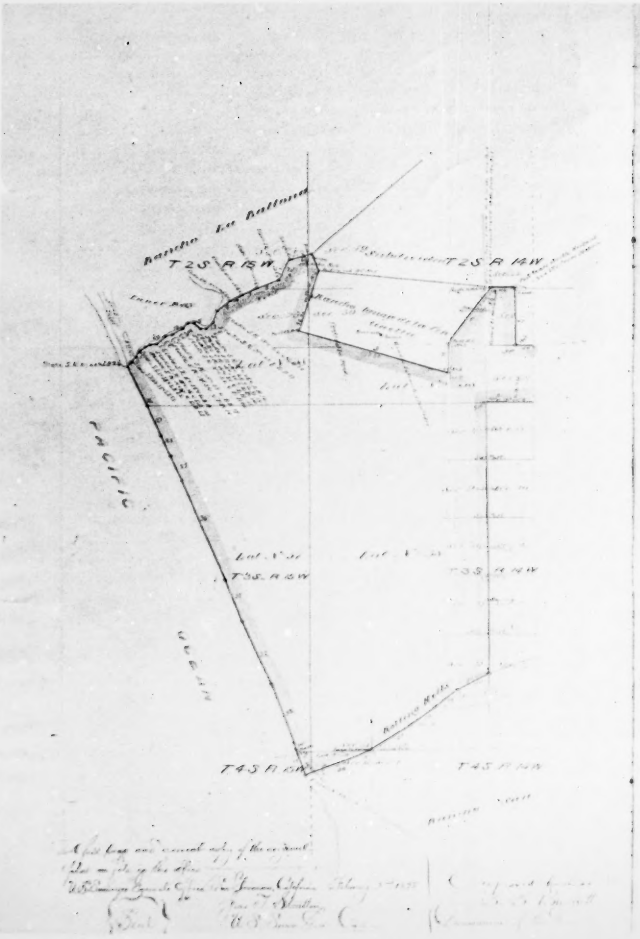


Boundaries

Cr	Course	Distance	Cr	Course	Distance
1	S 38½ W	33.00	36	S 38 E	143.00
2	Stake	40.00	37	do	60.00
3	N 52½ W	205.00	38	do	95.50
4	do	2.50	39	do	31.00
5	do	27.00	40	do	5.00
6	S 76½	34.00	41	do	37.50
7	do	34.00	42	N 89½	31.00
8	76½	32.50	43	S 89½	64.00
9	89½	18.00	44	S 52½	42.00
10	89½	18.50	45	S 52½	5.00
11	S 54½	23.00	46	S 89½	200.00
12	S 54½	17.00	47	S 89½	5.00
13	S 54½	17.33	48	S 71½	51.00
14	N 71½	6.00	49	S 89½	16.00
15	S 52½	10.00	50	North	378.50
16	S 73½	8.00	51	East	64.00
17	89½	3.00	52	North	160.00
18	89½	21.00	53	East	39.00
19	N 89½	7.00	54	North	161.00
20	S 89½	3.00	55	West	136.00
21	S 89½	16.00	56	South	7.00
22	S 89½	3.00	57	West	105.00
23	S 89½	3.00	58	South	5.00
24	S 45½	19.50	59	East	10.00
25	S 45½	5.00	60	South	50.00
26	S 89½ E	87.00	61	West	86.00
27	26	44.00	62	South	44.00
28	25	31.00	63	West	31.50
29	25½	55.00	64	South	87.50

The field notes of the Rancho Sausal Redondo finally confirmed to Antonio Ignacio Avila, from which this Plat has been made, have been examined and approved and a true Plat in this Office
U.S Surveyor General's Office
San Francisco, California,
April 14th 1869.

Solomon Dry
U.S Deputy Surveyor


Rancho La Ballona
T2S R15W
T2S R14W
PACIFIC
T3S R15W
T3S R14W
T4S R15W
T4S R14W

5th. Finding No 8 is wholly unsustained by the evidence and repugnant thereto.

6th. Finding No. 9 is unsustained by the evidence in so far as it is therein found that plaintiff acknowledged the tender therein referred to, to be good and sufficient.

Plaintiff therefore asks that a new trial be granted.

JOHN D. BICKNELL,
Attorney for Plaintiff.

(Here follow 2 photographic plats, marked p. 65.)

66 I hereby certify that the foregoing statement on motion for a new trial is correct and the same is hereby allowed.

SEPULVEDA, *Judge.*

November 25th, 1879.
Filed November 25, 1879.

Order of Court Denying New Trial.

Title of Court and Cause.

Motion for new trial denied. Thirty days stay.
Dated December 30th, 1879.

Notice of Appeal.

Title of Court and Cause.

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this State from the judgment rendered therein and entered in the said district court on the 22d day of September, 1879, in favor of the defendant in said action, and against said plaintiff and from the whole thereof;
67 and also from the order denying said plaintiff's motion for a new trial made and entered in said cause on the 30th day of December, 1879.

Dated this 25th day of February, 1880.

Yours, &c. JOHN D. BICKNELL,
Attorney for Plaintiff.

To the clerk of said district court, and J. W. Stump, attorney for defendant.

Endorsed: Due service & receipt of a copy hereof admitted after filing, this 25th day of Feb., 1880. J. W. Stump, att'y for def't.

Stipulation.

Title of Court and Cause.

It is hereby stipulated that the foregoing transcript on appeal contains a full, true, and correct copy of the following papers on file and of record in this cause, to wit: Complaint, amended and supplemental answer, motion to strike out and demurrer, ruling on motion and cross-complaint, findings, judgment, statement on motion

for a new trial, order denying new trial, and notice of appeal, together with the endorsements thereon; also that an undertaking on appeal in due form of law has been properly given and filed herein within the time and in the manner prescribed by law.

JOHN D. BICKNELL,
Att'y for Pl'ff.

J. W. STUMP,
Att'y for Def't.

Dated this 25th day of Feb., 1880.

Service admitted by copy this 21st day of March, 1880.

J. W. STUMP,
Att'y for Def't.

(Endorsed:) Filed March 16th, 1880. F. W. Gross, clerk, by John O. Wheeler, deputy.

68 *Judgment.*

In the Supreme Court of the State of California. Department two. July 9th, 1880.

NATHAN FLETCHER, Plaintiff and Appellant,
vs.
B. W. MOWER, Defendant & Respondent. } No. 7085.

On appeal from the district court of the 17th judicial district, in and for the county of Los Angeles.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Sharpstein, J., Thornton, J., concurring, and Myrick, J., special concurring opinion.

Whereupon, it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the 17th judicial district, in and for the county of Los Angeles, in the above-entitled cause, be and the same is hereby reversed with costs, with directions to the superior court of Los Angeles county to enter judgment upon the findings for the plaintiff, as prayed for in his complaint, and that the remittitur herein issue to the superior court of Los Angeles county.

69 *Opinion.*

In the Supreme Court of the State of California.

(Filed July 9, 1880.)

FLETCHER
vs. } No. 7085.
MOWER.

In December, 1875, the plaintiff agreed in writing to convey to the defendant twenty acres of land for $1,000. Defendant paid $500

of the purchase price down and executed a promissory note for the remaining $500, due eighteen months after its date. Whereupon the defendant took possession of the land.

After the note became due the plaintiff brought suit on the note, tendered a deed according to agreement, and prayed for judgment against the defendant for the amount due on the note, and that the land be sold and the proceeds applied in satisfaction of such judgment, etc. Prayer in usual form.

Defendant by his answer admits all these facts, but denies that the plaintiff had at the time of the execution of the agreement, or has now, the legal titles to the lands, and alleges that there is an entire failure of consideration for the agreement of defendant and the $500 paid. Alleges that the land was public land, subject to the general land laws of the United States, and that the defendant being a qualified pre-emptor, entered and settled upon the S. ½ of of the N. W. ¼ and N. ½ of S. W. ¼ of sec. 32, T. 2 S., R. 13 W., S. B. M., which includes the land in controversy, on the 12th day of March, 1876, claiming the same under the pre-emption laws of the United States. Alleges the qualification of defendant as a pre-emptor, that he has tendered his filing, proof, and payment in the United Land Office, etc.

Defendant also alleges that the land in controversy was until 1871 within the claimed and exterior limits of a valid Mexican grant and was not subject to selection by the State; that the title of plaintiff is by a patent from the State of California, which patent is alleged to be void.

Defendant also states that he tendered plaintiff the possession of the land and offered to account for the rents and profits, and demanded a rescission of the contract; and upon these facts defendant prays that the title of plaintiff be adjudged void, and that plaintiff be enjoined from asserting any title to the land; that the agreement between plaintiff and defendant be rescinded, and that defendant fendant recover judgment for the money paid plaintiff, etc.

Trial was had; judgment rendered for defendant as prayed for; motion for a new trial was made and denied, and this appeal taken from the order denying the motion and from the judgment.

The court found, among other things, that the approved township plat including the land in question was filed in the U. S. land office, April 22, 1868, that the land in question was selected by the State locating agent as lieu land, and was listed to the State in November, 1871, and that a patent issued from the State to one E. W. Squires; and the defendant in his answer alleges that the plaintiff's claim of title is deraigned through mesne conveyance from said Squires. In other words it is conceded that the plaintiff before and at the time of the making of his contract to convey said land to the defendant had succeeded to whatever right or title Squires acquired by and through the patent issued to him by the State.

The land is conceded to be agricultural land, and it is admitted that the defendant entered into possession under the agreement of the plaintiff, to convey the land to the defendant.

The land is within a certain tract of land which was taken in lieu

of the S. E. ¼ of section 36, T. 4 S., R. 4 W., San Bernardino meridian, and the court found: "That at the time of making said application and selection" the land in lieu of which it was taken "was, and has been ever since, and is now, in place, and is the property of the State of California, and has never been under the claim of any confirmed and finally surveyed Mexican or Spanish grant."

The decision of this cause must turn upon the question whether the plaintiff, when he tendered a conveyance of the land to the defendant, had a title thereto such as the parties contemplated, at the time of entering into their contract, that he should have and convey to the defendant. That he had a patent from the State is admitted. But it is insisted on behalf of defendant that, owing to certain inherent vices by which it is infected, it is voidable. We do not think that there can be any doubt as to the patent having vested in Squires and his grantors, all the right, title, and interest of the State in and to the land described in it. The act of March 27, 1872, vested any title which the State might have had before that time in him. The plaintiff tendered his deed to the defendant after the passage of what is known as the "Booth bill," and under the construction which has been given to that act of Congress by both the Secretary of the Interior and Attorney-General of the United States, the land in dispute was public land at the date of the selection by the State, and it was entirely competent for the United States, as between it and the State, to grant it to the State. We are entirely satisfied with that construction. From which it follows that the conclusions at which the court below arrived are erroneous.

Judgment reversed, with direction to the superior court of Los Angeles county to enter judgment upon the findings for the plaintiff as prayed for in his complaint.

SHARPSTEIN, J.

I concur.

THORNTON, J.

Concurring Opinion.

I concur in the judgment, for the reason that the defendant does not show such a failure on consideration as will defeat plaintiff's right to recover. As to whether any title passed by the State patent I express no opinion.

MYRICK, J.

70 *Order Denying Rehearing.*

In the Supreme Court of the *Supreme Court.*

Title of Court and Cause.

July 29th, 1882. Filed petition to hear cause in bank.

Title of Court and Cause.

Aug. 7th, 1882. Petition to hear cause in bank denied. By the court. In bank.

71 *Petition for Writ of Error.*

To the Hon. R. F. Morrison, chief justice of the supreme court of the State of California.

The petition of B. W. Mower, of Los Angeles county, in said State, respectfully shows:

That at the April term, A. D. 1880, of said supreme court (the highest court in said State of California in which a judgment could be rendered), in a certain suit in said court then pending, to wit, in a suit entitled as follows:

NATHAN FLETCHER, Plaintiff,
vs.
B. W. MOWER, Defendant. } No. 7085.

A judgment was rendered by said court, and filed and entered on the (9th) ninth day of July, A. D. 1880, against said defendant, B. W. Mower, your petitioner, and in favor of said plaintiff, Nathan Fletcher, and that such judgment was final.

And your petitioner further shows that by the issues in said suit, and by the rendition of said judgment, there was drawn in question titles (to lands), rights, privileges, and immunities claimed by
72 your petitioner, and also such titles, rights, privileges, and immunities claimed by said plaintiff under and by virtue of statutes of the United States, to wit, laws relating to public lands, and the construction and effect of such United States statutes, and that the said decision of said supreme court of California is against the rights, titles, privileges, and immunities claimed by your petitioner under such statutes of the United States. All of which appears manifest in the records of and in said suit.

Wherefore your petitioner respectfully prays that a writ of error to remove the record and proceedings in said suit to the Supreme Court of the United States be allowed with usual citations; and your petitioner will ever pray, etc.

B. W. MOWER.
EDWIN BAXTER,
Attorney for Petitioner & Defendant.

STATE OF CALIFORNIA, }
Los Angeles County, } *ss:*

On this 29th day ot June, A. D. 1882, before me personally came B. W. Mower, and made oath that he had heard read the foregoing petition by him subscribed, and knows the contents thereof, and that the same is true in substance and in fact.

B. W. MOWER.

Subscribed and sworn to before me, this 29th day of June, 1882.
[SEAL.] J. J. WARREN,
Notary Public.

Endorsed: Filed July 6th, 1882. F. W. Gross, clerk, by J. B. Martin, deputy. Edwin Baxter, att'y for def't, petitioner.

73 *Order Allowing Writ.*

UNITED STATES OF AMERICA, } ss:
State of California, }

Whereas in a certain suit then pending in the supreme court of the State of California (the highest court of law or equity in said State in which a judgment in said suit could be rendered,) which suit was entitled:

NATHAN FLETCHER Plaintiff } No. 7085. (April Term, 1880.)
vs.
B. W. MOWER Defendant. }

A judgment and decision of said court against said defendant, B. W. Mower, and in favor of said plaintiff, Nathan Fletcher, was rendered and filed July 9th, 1880;

And whereas a petition has been presented to me this day by and on behalf of said defendant, B. W. Mower, for the allowance of a writ of error to the said supreme court of California to remove said cause and the record and proceedings therein to the Supreme Court of the United States, for the reason that rights, titles, privileges
74 and immunities claimed under statutes of the United States were drawn in question in said suit and decision:

Having inspected the record in said suit or case, I do hereby allow such writ of error as prayed. Let the writ issue.

Witness my hand at San Francisco, in the State of California, this 6th day of July, 1882.

(Signed) ROB'T F. MORRISON,
Chief Justice of the Sapreme Court of the State of California.

Filed July 6th, 1882.

F. W. GROSS, *Clerk,*
By J. B. MARTIN, *Deputy.*

75 *Bond.*

In the Supreme Court of the United States.

B. W. MOWER Plaintiff in Error
vs.
NATHAN FLETCHER Defendant in Error.

Know all men by these presents, that we, B. W. Mower, H. Buoy, J. C. Salisbury, and A. S. Shorb, all of Los Angeles county, California, are held and firmly bound unto Nathan Fletcher, said defendant in error, in the sum of five hundred (500.00) dollars, lawful money of the United States of America, to be paid to said Nathan Fletcher, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us jointly
76 and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, dated this 6th day of July, A. D. 1882.

Whereas the above-named B. W. Mower, plaintiff in error, has prosecuted a writ of error to the Supreme Court of the United

States to reverse the judgment rendered in the cause entitled Nathan Fletcher against B. W. Mower by the supreme court of the State of California:

Now, therefore, the condition of this obligation is such, that if the above-named B. W. Mower shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be null and void; otherwise, to remain in full force and virtue.

B. W. MOWER. [SEAL.]
H. BUOY. [SEAL.]
A. S. SHORB. [SEAL.]
J. C. SALISBURY. [SEAL.]

Signed, sealed, and delivered in presence of—
E. BAXTER.
J. W. MORTON.

77 UNITED STATES OF AMERICA, *State of California:*

H. Buoy, A. S. Shorb, and J. C. Salisbury, the sureties to the above bond subscribed, being first duly sworn, each for himself, deposes and says: That he is a resident and freeholder in said State of California and is worth the sum of five hundred (500) dollars, exclusive of property exempt from execution, over and above all his just debts and liabilities.

H. BUOY.
A. S. SHORB.
J. C. SALISBURY.

Subscribed and sworn to before me, this 8th day of July, A. D. 1882.

[SEAL.] FRANK W. GROSS,
Clerk Supreme Court Cal.,
P. JOHN O. WHEELER, *Dep'ty.*

The amount of the bond in the within mentioned case is hereby fixed at five hundred ($500.00) dollars.

Dated July 6th, 1882.

(Signed) ROBT F. MORRISON,
Chief Justice of California.

Approved by me.
R. F. MORRISON,
Chief Justice.

(Endorsed:) Filed July 8th, 1882. F. W. Gross, clerk, by John O. Wheeler, dep'ty.

78 *Writ of Error.*

UNITED STATES OF AMERICA.

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of

the judgment of a plea, which is in the said supreme court, before you, between B. W. Mower, plaintiff in error, and Nathan Fletcher, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

[SEAL.] L. S. B. SAWYER,
Clerk of the U. S. Circuit Court, District of California,
By J. F. O'BEIRNE,
Deputy Clerk.

The above writ of error is hereby allowed.

R. F. MORRISON,
Chief Justice of California.

79 [Endorsed:] United States Supreme Court. B. W. Mower, plaintiff in error, *vs.* Nathan Fletcher, defendant in error. Writ of error lodged in the clerk's office of the supreme court of the State of California for the within-named defendant in error. Dated July 6th, 1882. Edwin Baxter, att'y for pl'ff in error. Filed July 6th, 1882. F. W. Gross, clerk, by J. B. Martin, deputy.

80 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Nathan Fletcher, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein B. W. Mower is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert F. Morrison, chief justice of the

supreme court of the State of California, this 6th day of July, A. D. 1882, and of the Independence of the United States the 107th.

[SEAL.] R. F. MORRISON,
Chief Justice of California.

Attest: F. W. GROSS,
Clerk of Supreme C't of California,
By J. B. MARTIN,
Deputy.

81 [Endorsed:] United States Supreme Court. B. W. Mower, plaintiff in error, *vs.* Nathan Fletcher, defendant in error. Citation. Filed Aug't 21, 1882. F. W. Gross, cl'k, pr. John O. Wheeler, dep. Edwin Baxter, attorney for plaintiff in error, Los Angeles, Cal.

I hereby acknowledge receipt of a true copy of the within, this 8th day of July, A. D. 1882.

JOHN D. BICKWELL,
Att'y for Pl'f't.

82 *Clerk's Certificate.*

In the Supreme Court of the State of California.

B. W. MOWER, Plaintiff in Error,
vs.
NATHAN FLETCHER, Defendant in Error. } 7085

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the foregoing 82 pages, numbered from 1 to 82, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the above-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the above court, this 21st day of September, A. D. 1882.

[SEAL.] FRANK W. GROSS, *Clerk,*
By C. HARLAN, *Deputy.*

83 *Assignments of Error.*

UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

B. W. MOWER, Plaintiff in Error,
vs.
NATHAN FLETCHER, Defendant in Error.

Error to the supreme court of California.

And now comes the said plaintiff in error, by Edwin Baxter and Wm. J. Johnston, his counsel, and says that in the record and proceedings, and in the rendition of the judgment in this cause in the supreme court of the State of California, there was drawn in question the construction and the constitutionality of the statutes of the

United States in relation to the disposition of the public lands of the United States, and such statutes by such decision of said State court were erroneously construed, and such decision and construc-
84 tion of such statutes was against the right, title, and privileges of said plaintiff in error, set upon, claimed, under such statutes.

And said plaintiff in error says that in the said decision and judgment of said supreme court of the State of California there are manifest errors, to wit: That said court erred—

I.

In deciding that the contract of the plaintiff *plaintiff* below (defendant in error in this court) with the defendant below (plaintiff in error in this court), for the sale of the land in said contract or bond described, and upon which this suit is brought, was a valid contract under the laws of the United States.

II.

In deciding that the plaintiff below (defendant in error), at the time of making said contract, bond, or agreement, on which this action is brought or founded, or at any time before said suit was commenced, had any valid title to the lands he covenanted to convey.

85 In deciding that said plaintiff below, Nathan Fletcher, by the deed he proposed or offered to give to defendant below, did or could convey any title to the land in controversy.

III.

In deciding that plaintiff in error (defendant below) ever received or was ever offered by the plaintiff below any good or legal consideration or valuable consideration for his payment of five hundred dollars or for his promissory note of five hundred dollars, on which this action is brought.

IV.

In deciding that the said Nathan Fletcher, plaintiff in said State court, by his title or pretended title derived from E. W. Squires, acquired any right, title, or interest in the land he agreed to convey to plaintiff in error as consideration for his money paid and the note on which this suit is brought.

VI.

86 In deciding that the State of California, at the time of its patent of said lands to said E. W. Squires, had or ever had or acquired from the United States any valid or legal claim, right, title, or interest in or to the land in said patent described as against the United States, or its grantees, or any person deriving claim or title under the laws thereof.

VII.

In deciding that the defendant in said State court, plaintiff in error, did not himself, at the time this suit was instituted or com-

menced, have the title or right to the title to the said land by virtue of the pre-emption laws of the United States, and his own proceedings thereunder in pursuance of said laws.

VIII.

In rendering judgment for the plaintiff in said State court and against the defendant upon the note for five hundred dollars, given without good, legal, or valuable consideration.

IX.

87 In deciding, contrary to its own findings, and unsupported thereby, that the act of Congress therein referred to as the "Booth bill" (U. S. Stat., 1876–'7, p. 267,) conferred upon the State of California or confirmed to said State the land in controversy.

X.

In deciding that by the said act of Congress, or the construction given thereto by the officers of the United States, the land in dispute was public land of the United States at the time of its selection by the State of California.

XI.

That said judgment of said supreme court of the State of California was against the defendant (plaintiff in error) and his rights, and is in conflict with the laws of the United States and its Constitution, and is erroneous, unjust, and inequitable.

Plaintiff in error therefore prays that said judgment of said State supreme court may be reversed, and the judgment of the trial court herein may be affirmed with costs.

EDWIN BAXTER, *Attorney.*
WILLIAM J. JOHNSTON,
Counsel for Plaintiff in Error.

88 [Endorsed:] In the Supreme Court of the United States. B. W. Mower, plaintiff in error, *vs.* Nathan Fletcher, defendant in error. Assignment of error. Edwin Baxter, Los Angeles, Cal. Wm. J. Johnston, Washington, D. C., counsel for pl'ff in error. Supreme Court U. S. 1882. October term. No. 1058. B. W. Mower, pl'ff in error, *vs.* Nathan Fletcher. Assignment of errors. Filed 13th Oct'r, 1882.

I hereby acknowledge receipt of a copy of the within assignment of error.

JOHN D. BICKNELL,
Att'y for N. Fletcher, Defendant in Error.

Endorsed on cover: California sup. court. No. 372. B. W. Mower, plaintiff in error, *vs.* Nathan Fletcher. Filed 13th October, 1882.

116-380

In the Supreme Court of the United States

OCTOBER TERM, 1884.

B. W. MOWER,
Plaintiff in Error,
vs.
NATHAN FLETCHER,
Defendant in Error.

No. 372.

In Error to the Supreme Court of the State of California.

Answer of Plaintiff in Error to Motion to Dismiss for Want of Jurisdiction.

WILLIAM J. JOHNSTON,
Counsel for Plaintiff in Error.

WASHINGTON, D. C.
C. W. BROWN, PRINTER, 923 F ST., N. W.
1885.

In the Supreme Court of the United States

October Term, 1884.

B. W. MOWER,
Plaintiff in Error,

vs.

NATHAN FLETCHER,
Defendant in Error.

No. 372.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Answer of Plaintiff in Error to Motion to Dismiss for Want of Jurisdiction.

This motion to dismiss ought not to be granted.

I.

It appears affirmatively from the record that this appeal was taken from a *final* judgment of the Supreme Court of the State of California, which is in the following words:

"Whereupon, it is now considered, ordered, adjudged and decreed by the court here, that the judgment of the district court of the 17th judicial district in and for the county of Los Angeles, in the above entitled cause, be, and same is hereby reversed with costs, and the cause remanded to the Superior Court of Los Angeles County, to enter judgment upon the findings for the plaintiff, as prayed for in his complaint, and that the *remittitur* herein issue to the Superior Court of Los Angeles County."

II.

The authorities relied on by counsel for defendant in error,—

McCombs *vs.* Commissioners, 91 U. S., p. 1;
Young *vs.* Emslie, No. 170, Docket of present term;
Davis *vs.* Crouch, 94 U. S.. 514,

utterly fail to support the theory sought to be established, that the foregoing is not a *final* judgment; and an examination of these cases will show that they are in no sense parallel to this under consideration, and afford no authority for the action prayed for.

In each of these cases it clearly appears that the action of the court in dismissing the writ was based upon the fact that the judgment appealed from remanded the cause for further proceedings in the lower court; hence was not *final*, because it did not terminate the litigation between the parties to the suit.

That a judgment may be one of reversal, and yet not a *final* judgment, reviewable here, may be readily conceded, as this principle has been well established by numerous decisions of this court, besides those cited by counsel for defendants in error; but all of these cases show that the cause was remanded for *further proceedings* in the court below; hence the judgment was not *final*, because the cause might yet be determined in favor of the plaintiff in the State courts. The only plain and reasonable deduction to be reached from an examination of these cases, is, that had the judgment appealed from decided and disposed of the merits of the cause, and reserved no further questions or directions for the future judgment of the court, so that it would not be necessary to bring the cause again before that court, it would have been held to be a *final* judgment, reviewable here.

In McCombs *vs.* ~~U. S.~~, relied upon by counsel for defendant in error, the case was taken on writ of error to the

Supreme Court of the State, where the judgment of the Common Pleas was reversed for error in sustaining the demurrer to the replies, but upon suggestion by McComb that he might ask leave to amend his answer, the case was remanded for further proceedings, according to law. Upon the filing of the mandate in the Common Pleas, that court, in accordance with the decision of the Supreme Court, overruled the demurrer to the replies, and sustained that to the answer. McComb did not ask leave to amend his answer, but elected to rely upon his defense, as already stated; thereupon, the court (of Common Pleas) gave judgment against him upon the case made by the petition. The writ of error was prosecuted to reverse that judgment.

This court held that the court of Common Pleas was not the highest court of the State, and that it was called on to examine the judgment of that court alone. That the judgment of the Supreme Court of the State was one of reversal only, and not a final judgment. That the Common Pleas was not directed to enter a judgment rendered by the Supreme Court and carry it into execution (as in this case), but had ample power to permit the parties to make a new case by amendment, which would be subject to appeal and judgment thereon, and for that reason was not a final judgment of the highest court of a State, and within the provisions of Sec. 709, Revised Statutes.

The cases of Young *vs.* Emslie and Davis *vs.* Crouch, *supra*, also relied upon by counsel for defendant in error, are of the same character, and were not final judgments, but, as correctly stated by counsel, were "remanded for further proceedings in accordance with the views of the court as expressed."

In Houston *vs.* Moore, 3 Wheat., 433, suit was commenced in the court of Common Pleas, the jury found for plaintiff, upon which judgment was rendered. The cause was carried to the Supreme Court of Pennsylvania, where the judgment of the Common Pleas was reversed, and the cause remanded

with directions to award a *venire facias de novo*. Chief-Justice Marshall held that this was not a final judgment, as the cause may yet be determined in favor of the plaintiff in the State court, and dismissed the writ.

In Pepper *vs.* Evans, 5 How., 51, Chief-Justice Taney dismissed the writ, because the decree remanding the case for further proceedings specifically stated that the evidence did not enable the court to finally pass upon the rights of the parties, and especially as to the amount to be refunded, hence the judgment was not a final one.

In St. Clair Co. *vs.* Livingston, 18 Wall., 628, wherein the judgment appealed from remanded the cause for further proceedings, this court held that no judgment is final which does not terminate the litigation between the parties to the suit; that in that case the issue between the parties might be again tried before the Circuit Court, and another judgment recovered, which might be removed to the Supreme Court for revision, consequently there had been no final determination of the cause. The plain import of these decisions must be, that had the judgments appealed from been determinative of the rights of the parties to the suits, and ended the litigation between them in that court, they would have been held *final* judgments, properly reviewable by this court.

To the same purport are the following:

Tracy *vs.* Holcomb, 24 How., 426.
Moore *vs.* Robbins, 18 Wall., 588.
Mayberry *vs.* Thompson, 5 How., 121.
Brown *vs.* Union Bank of Fla., 4 How., 465.
U. S. *vs.* Fossatt, 21 How., 443.
U. S. *vs.* Gerault, 11 How., 22.
Farrelly *et al. vs.* Woodfolk, 19 How., 288.
Boyle *vs.* Zacharie & Turner, 6 Pet., 648.
Smith *vs.* Trobue's heirs, 9 Pet., 4.
Taylor *vs.* Morton, 2 Black., 481.
Winn's heirs *vs.* Jacobson *et al.*, 12 Wheat., 135.

On the question as to what constitutes a final judgment or decree, this court in Sparrow *vs.* Strong, 3 Wall., 97, overruled the motion to dismiss, where a motion for new trial was pending, and doubt existed in the mind of the court whether it had ever been decided; the only judgment found being a general judgment. It was held final and reviewable.

In Beebe *et al. vs.* Russel, 19 How., 283, this court held that where a decree finally decides and disposes of the *merits* of a cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree; that when only ministerial duties remain to be done under direction of the court, as to ascertain a sum due (or, as in this case, to enter judgment upon the findings), it is a *final* decree or judgment, and the direction is but a consequence of the decree. In the case of Farrelly *et al. vs.* Woodfolk, 19 How., 288, the rule in the foregoing case was affirmed and applied.

In view of the foregoing, and tested by the rule in the cases cited, we submit, that the judgment in this case, entered by the Supreme Court of California, was and is a *final* judgment, mandatory upon the court below, and the entering thereof by the district court of Los Angeles, a mere ministerial duty; the direction so to do, but a consequence of the judgment; that as such *final* judgment, it was appealable by writ of error.

We ask that the motion may be denied.

WILLIAM J. JOHNSTON,
Counsel for Plaintiff in Error.

116-380

IN THE

Supreme Court of the United States.

October Term, 1884.

B. W. MOWER,
Plaintiff in Error,

vs.

NATHAN FLETCHER
Defendant in Error,

No. 372.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Motion and Argument of Defendant in Error to dismiss for want of jurisdiction.

M. D. BRAINARD.
JAMES K. REDINGTON.
Counsel for Defendant in Error.

WASHINGTON, D. C.
BYRON S. ADAMS, PRINTER,
514 Eighth Street, N. W.

IN THE

Supreme Court of the United States.

October Term, 1884.

B. W. MOWER,
Plaintiff in Error,

vs.

NATHAN FLETCHER,
Defendant in Error,

No. 372.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOTION OF DEFENDANT IN ERROR TO DISMISS FOR WANT OF JURISDICTION.

Now comes the defendant in error and moves the court to dismiss said case for want of jurisdiction upon the following ground, to wit:

Because the judgment from which said appeal was taken is not a final judgment in said case.

NOTICE TO COUNSEL.

To William J. Johnson, Esq., of counsel for plaintiff in error:

You will please take notice that the foregoing motion will be made and argued in the Supreme Court of the United States on Monday, March 23, 1885, or as soon thereafter as the court hear the same.

Respectfully,

M. D. BRAINARD,

JAMES K. REDINGTON,
Counsel for Defendant in Error.

Service of copy acknowledged this 27th day of February, A. D. 1885.

W. J. JOHNSTON,
Counsel for Plaintiff in Error.

STATEMENT OF FACTS.

This cause was originally tried in the District Court of the 17th Judicial District for Los Angeles County, California, and judgment was rendered for the defendant (Mower) on June 13th, 1879, and thereupon an appeal was taken by the plaintiff (Fletcher) to the Supreme Court of California. On July 9th, 1880, the Supreme Court of California reversed the judgment of the District Court, for the reasons stated at length in an opinion filed (*vide* p. 30 *et seq* Record) and remanded the case to the lower court for further proceedings. The judgment of the Supreme Court is in these words: "Whereupon, it is now considered, ordered, adjudged and decreed, by the court here, that the judgment of the District Court of the 17th Judical District, in and for the County of Los Angeles, in the above entitled cause, be, and the same is hereby reversed with costs, with directions to the superior court of Los Angeles County to enter judgment upon the findings for the plaintiff, as prayed for in his complaint, and that the remittitur herein issue to the superior court of Los Angeles County." P. 30 Record.

The record does not show that final judgment was entered

by the District court pursuant to this judgment and decree of the Supreme Court.

This appeal is taken from the judgment of the Supreme Court of California above quoted.

Argument.

Under Section 709, Revised Statutes, this court has jurisdiction to re-examine, reverse or affirm, upon writ of error, the *final judgments* or decrees of the highest court of a State in certain cases therein mentioned.

The judgment sought to be reviewed, must, by the express terms of this Statute, be a *final judgment*, otherwise this court is without jurisdiction to re-examine it.

The judgment rendered by the Supreme Court of California, in this case, shows upon its face that it is not a *final judgment.*

It is plainly a judgment reversing the decision of the lower court and remanding the case for *the entry of a proper judgment* in accordance with the views expressed by the Supreme Court.

The record does not show that a final judgment has been entered in the lower court pursuant to the decree of the Supreme Court of the State, and manifestly, until such judgment is entered *correctly* by the district court, there is no *final* judgment in the cause.

The mere reversal of the judgment of a lower court by the highest State tribunal is not such a *final* judgment as will bring the cause within the jurisdiction of this court. McCombs *vs.* Commissioners, 91 U. S., p. 1. 94 id. 514.

In Young *vs.* Emslie, No. 170, on the docket of the present term of this court, decided January 19th, 1885, in error from the Supreme Court of Kansas, the judgment of said court was as follows: "It is ordered and adjudged that the judgment of the court below be reversed and the cause remanded for further proceedings, in accordance with the views of the court, as expressed in its written opinion filed herein."

In legal effect, this was precisely the same judgment as that

rendered by the Supreme Court of California in the present case.

In that case, as in this, the case was reversed and remanded to the lower court, with directions to enter judgment in accordance with the opinion of Supreme Court.

In that case, as in this, the record failed to show that a final judgment had been entered by the lower court, whereupon this court ma e the following order, to wit: "It appearing to the court that the record does not show that a final judgment has been entered in the lower court, it is now here ordered and adjudged by this court that the writ of error in this cause be, and the same is hereby dismissed with costs."

It is submitted that this decision is directly in point, and that this case should be dismissed.

Respectfully submitted,

M. D. BRAINARD.

JAMES K. REDINGTON.

Counsel for Defendant in Error.

116-380

Office Supreme Court U. S.
FILED.
DEC 9 1885
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1885.

B. W. MOWER,
Plaintiff in Error,
vs.
NATHAN FLETCHER.

No. 102.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR.

EDWIN BAXTER, Los Angeles, Cal.
WM. J. JOHNSTON, Washington, D. C.
Attorneys for Plaintiff in Error.

U. J. BAXTER,
of Counsel.

WASHINGTON, D. C.
U. S. GAZETTE PRINT, 719 Market Space.
1885.

Supreme Court of the United States.

October Term, 1885.

B. W. MOWER, *Plaintiff in Error*,
vs.
NATHAN FLETCHER. } No. 102.

In Error to the Supreme Court of the State of California.

BRIEF OF PLAINTIFF IN ERROR.

EDWIN BAXTER, Los Angeles, California, and WM. J. JOHNSTON, Washington, D. C., Attorneys for Plaintiff in Error; U. J. BAXTER, of Counsel.

STATEMENT.

This is an action upon a promissory note, given for part purchase-price of twenty acres of land. The land was bought upon an executory contract in form of a bond for a good and sufficient deed. Five hundred dollars was paid down as per contract, and five hundred dollars to be paid in eighteen months with interest, upon execution and delivery of the deed.

The defense is, failure of consideration—that plaintiff has no title.

PREMISES.

The act of United States Congress of March 3, 1853, "To provide for the survey of public lands in Cali-

fornia, the granting of pre-emption rights therein and for other purposes," placed the public lands of the United States in California subject to the general pre-emption law of 1841, excepting, among other lands specified, sections 16 and 36 of each township, which were thereby granted to the State of California for the purposes of public schools. It also granted, and was afterwards further construed by the sixth section of the act of July 23, 1866, as "giving to the State of California the right to select, for school purposes, other lands in lieu of such sixteenth and thirty-sixth sections as were reserved for public use, covered by grants under Spanish or Mexican authority, or by other private claims." And in such cases, "the Surveyor General of the State of California shall furnish the State authorities with lists of all such sections" so covered, as a basis of selection, etc.

April 27, 1863, the State of California passed an act providing for the sale, among other lands, of the sixteenth and thirty-sixth sections of the several townships, and of lands which might be selected in lieu of such sixteenth and thirty-sixth sections as were included in private claims or grants as excepted in the act of 1853.

The manner of procuring title from the State for such lands was in detail, set forth in the State act. (Stats. Cal. 1863, pp 591 to 601.)

FACTS IN THIS CASE.

We give the facts as near as may be, in the order of their date, without reference to the order given in the record.

The twenty acres of land sold by Fletcher, plaintiff, to Mower, defendant (below,) was included

and N½ of SW¼

in the larger description, the S. 1-2 of N. W. 1-4 of section 32, T. 2S., R. 13W., S. B. M. (Record. fols. 21.)

The Rancho Sausal Redondo was granted by the Mexican Government to Antonio Ygnacio Abila in 1837; confirmed by the Board of Land Commissioners June 10, 1855, and the land here involved was within the claimed limits of said grant, as claimed by the grantees until Oct. 31, 1871, (so found by the trial court.) (Fol. 20, Record.)

In February, 1868, the lines of the grant were surveyed by U. S. Deputy Surveyor Hansen. The survey was recalled in May, 1868, and the grant resurveyed by Deputy Surveyor Thompson, and the survey of Thompson rejected Oct. 31, 1871.

The survey of February, 1868, *with slight modifications,* was approved by the Commissioner of the General Land Office, March 22, 1875. (Fol. 20, Record.)

March 6th, 1868, after the survey of Hansen and before its recall, one Elmore W. Squires made application to purchase from the State of California, the quarter-section above described, including the land for part purchase-price of which this action is prosecuted, purporting to make such application under the acts of Congress of 1853 and 1866, and the State act of 1863, above mentioned.

The application states: "This location has been made by me in lieu of the S. E. 1-4 of Sec. 36, T. 4S. R. 4W., San Bernardino Meridian, which is included in a private grant." (Record, fols. 21 and 38.)

This statement is not true; said 36th section never having been included in any private grant nor lost to

the State, as will appear by the further recitals herein. (Record, fols. 24 and 45.)

The application was accepted April 20, and location made April 22, 1868, by the State locating agent and filed with the Surveyor General of the State, June 12, 1868. (Record, fol. 21.)

The lands embraced in said application, selection and location were on the 21st day of November, 1871, certified to the State of California by the approval by the Secretary of the Interior of the list containing the same. (Record, fol. 24.)

A certificate from the State Surveyor General was issued for the land July 9, 1872, and patent issued by the State to Squires March 31, 1873. (Record, fol. 41.)

The trial court found many irregularities and inherent vices in the application of Squires, such as to render the selection invalid for non-compliance with the State law; such as want of a signature to the application; want of an affidavit required by statute; failure to file in the Recorder's office of the County a description of the land. (Record, fol. 21.)

No list was ever furnished by the United States Surveyor General to the proper authorities of the State including any part of Sec. 36, T. 4S. R, 4W., S. B. M., as a basis of selection for other lands in lieu thereof, as required by section 6, act of July 23, 1866. (Record, fols. 23 and 44.)

Section 36, T. 4S. R. 4W. was surveyed in 1856, and the survey approved in 1857. No private grant or claim was ever located thereon. It was not, nor was any part thereof included in any private grant; and

the land selected as the basis of this "lieu" was, ever since 1857, found "in place" by reason of such approved survey, and was the property of the State of California. (Record, 5th finding of court. Fol. 24 and fol. 45.)

Nathan Fletcher, plaintiff below, previous to December, 1875, by mesne conveyences, had acquired all the title Squires obtained by his patent from the State. (Record. fols. 15 and 61.)

Having this appearance of the title and no other, Fletcher, in December, 1875, representing that he had a perfect title, contracted with Mower to sell him the twenty acres of land embraced in this suit, and gave him a written agreement, in form of a bond, that on payment of $1,000, $500 cash down and $500 in eighteen months, with interest at one per cent. per month, he would, *by a good and sufficient deed, convey* to Mower said twenty acres. (Record. fols. 2, 6, 26 and 53.)

Mower paid the $500 down and gave his note for $500 and interest, as agreed.

Mower went into possession of the land. But, on discovering that Fletcher had no title, he removed to an adjacent parcel abandoned by one McCollum (being also part of the land, for which said McCollum, a grantee of Fletcher, and who had mortgaged the land to said Fletcher, held the apparent State title by purchase under Squires.) Mower claimed the whole as a pre-emptor, and offered to file his declaratory statement and notice in the U. S. Land Office. His offer was rejected and he appealed. He then, after six months' residence, again offered his filing, offered to make proof of settlement, and tendered the

full price of the land ($200 for the whole 160 acres.) His offer was refused and he appealed. His appeal was still pending in the Land Department when this suit was tried in the District Court. (Record. fols. 53, 54, 55.)

Mower was a duly qualified pre-emptor, and had taken all the steps required by law to obtain the title to public land under the pre-emption laws of the United States, and had made valuable improvements and occupied the same continuously with his family ever since his entry. (Fols. 53 and 54, Record.)

After the note for $500 became due by its terms, Fletcher tendered a deed of bargain and sale, and demanded payment of the note. He having no other title than above shown, Mower refused payment, on the ground that the deed conveyed no title, and that his note and previous payment were made without consideration.

Fletcher commenced suit for the $500 and interest due on the note, alleging that when he made the bond and contract of sale, and when the action was commenced, he was the owner of the land in fee. He prayed for judgment for $500 and interest, and that the land be sold to satisfy the same.

Mower answered, admitting the contract of sale, the note, and his refusal to pay; alleging a failure of consideration, on the ground that his purchase was made upon plaintiff's (Fletcher's) representations that he was owner in fee of the premises, and that such representations were false and fraudulent. He set forth the assumed title of plaintiff substantially as above stated, (and as proved on the trial,)

alleging such title to be void. (Record, fols. 13 to 21.)

Mower also alleged ownership in himself by virtue of his proceedings under the pre-emption laws of the United States. (Record, fols. 8 to 11.)

He also tendered possession and payment of the rents and profits, and asserted a counter claim for repayment of the money paid and interest. (Record, fols. 16 and 32.)

Trial was had and judgment rendered in the District Court against the plaintiff and in favor of defendant for his counter claim. (Record, fol. 29.)

The findings of the court were in favor of the defendant upon every issue and question presented by the pleadings, both of fact and of law. (Record, fols. 19 to 27.)

An appeal was taken by Fletcher from the judgment of the District Court, to the Supreme Court of the State of California.

The appellate court reversed the judgment, and directed that judgment be entered for the plaintiff, for the relief prayed, to wit: for $500 with interest and costs, and for sale of the land to satisfy the judgment. (Record, fol. 68.)

Mower, the defendant below, removes the case into this court by writ of error to the Supreme Court of California.

The only question in the case is one of failure of consideration, and that rests upon the question: Did the plaintiff, (below) Fletcher, have such a title that his deed of bargain and sale, would have conveyed a good title in fee simple to the land?

In rendering judgment for the plaintiff below, the California Supreme Court necessarily decided that his deed would convey a good title. See opinion (Record, fol. 69.)

The plaintiff in error makes the following

ASSIGNMENTS OF ERROR:

I.

The Supreme Court of the State of California erred in deciding that ',the plaintiff (below) when he tendered a conveyance of the land to the defendant had a title thereto, such as the parties contemplated, at the time of entering into their contract, that he should have and convey to the defendant." (Page 32 Record.) There is absolutely no evidence on which to base such a finding.

II.

In deciding that the State of California, had or ever had, any valid title to the land and conveyed any title to Squires, grantor of the plaintiff below.

III.

In deciding that the land in dispute, for which the note was given, was public land of the United States, and free from private claims at the time of its selection by the State, and that the officers of the land department at that time had power to grant it to the State.

IV.

In deciding that when he made the contract or bond for sale to Mower, when he tendered the deed, or at any other time, Fletcher had or could convey a good title, or any title, to said land.

V.

On such premises, or any premises, upon the facts proved or admitted, in rendering judgment for the reversal of the judgment of the District Court and directing judgment to be entered for the plaintiff; and in not confirming the judgment of the District Court as entered.

POINTS AND ARGUMENT.

There can be no question that plaintiff below (Fletcher) by his contract or bond, covenanted to convey a good and sufficient title. And the evidence (fol. 53, Record) is undisputed that Mower agreed to purchase, relying solely on plaintiff's representations that he was the owner in fee and could convey a perfect title.

In fact, it was not claimed either in the pleadings or upon the trial that Mower knew anything about the title, except what he was told by Fletcher or his agent, when he agreed to purchase.

That an agreement or covenant to convey "by a good and sufficient deed," or even simply to "convey" a piece of land, is only satisfied by a conveyance of a good and perfect title, cannot now admit of a question.

"A covenant to execute and deliver a good and sufficient deed of a piece of land does not mean merely a conveyance in point of form. That would be a covenant without substance. But it means an operative conveyance; one that carries with it a good and sufficient title of the lands conveyed."

Clute *vs.* Robinson, 2 Johnson, (N. Y., 595.)

"*The title* meant the legal estate in fee, free and clear of all valid claims, liens and encumbrances whatever. It is the ownership of land, the *dominum directum et absolutum*, without any rightful participation by any other person in any part of it." * * * "For want then of showing the tender of a sufficient deed to convey the title, the defendant is entitled to judgment."

Jones *vs.* Gardner, 10 Johnson, 265.

Re-affirmed, and that the purchaser was not bound to tender the purchase money if the vendor was not in condition to convey good and indefeasible title, subject to no other incumbrance or charge than that specified in the conditions.

Judson *vs.* Wass, 11 Johnson, 525.

This last was an action precisely, in its material points, like the one at bar here.

Even a warranty of title is not sufficient to satisfy the covenant if the grantor has no title.

Fletcher *vs.* Button, 4 Comst. (N. Y., 396.)

"There is, in every executory contract for the sale of land, *whatever may be the language in which the agreement is couched,* an implied undertaking to make a good title, unless such an obligation is expressly excluded by the terms of the agreement."

Burwell *vs.* Jackson, 5 Selden, (N. Y., 535.)

And a purchaser cannot be compelled to take a deed with covenant if vendor has not a good title. Ib.

The vendor cannot recover on a note given for purchase-money on such contract until he tenders such good title. Ibid.

Dwight *vs.* Cutler, 3 Mich., 566, (p. 576.)
Thayer *vs.* White, 3 Cal., 228.
Haynes *vs.* White, 55 Cal., 38.

The title must be a marketable one, not open to reasonable objection.

Freetly *vs.* Bamhost, 51 Penn., 279.
Allen *vs.* Atkinson, 21 Mich., 351, 361.

Rawle on covenants of title, 565, 3d Ed; also 40, 41, 42, 43, 4th Ed.

Cites; directly in point,

Everson *vs.* Kirtland, 4 Paige, 628.
Carpenter *vs.* Bailey, 17 Wend, 244.
Winne *vs.* Reynolds, 6 Paige, 407.
Pomeroy *vs.* Drury, 14 Barb, (S. C., N. Y., 424.)
Sugden on Vendors, 13th Ed., 440.
Hill *vs.* Ressegieu, 17 Barb, 164.
Vardeman *vs.* Lawson, 17 Texas, 16.

Although the title may in fact be good, yet if there is reasonable dispute concerning it and proceedings are pending for its confirmation, the vendee is not compelled to accept the deed until the doubt is settled by competent authority. Consequently, no suit for purchase money can be maintained, and it was error to decide in favor of plaintiff (Fletcher.)

That this is so, see Clute *vs.* Robinson, *supra*, where a deed or patent of the State had issued to the vendor for lands located under a supposed grant, and the question was pending whether or not such patent was void for want of a proper basis for the location. The court, by Chancellor Kent, held clearly that until the actual confirmation of title by new legislative provision, no specific performance could be in-

sisted upon by the vendor; and by implication held that such confirmation must have been made and a good deed tendered before the date of the master's report. Later authorities agree that it must be made before action brought, and perhaps before repudiation of the agreement by the vendee.

Such vendee is not bound by failure to inquire at date of contract, but has the right to repudiate and treat the contract as rescinded if there be entire failure of title.

For affirmance of these last two propositions see Burwell *vs.* Jackson, *supra*, wherein the learned judge (Selden) exhaustively discusses the whole subject and the reason of the law, and declares that under such an executory agreement

"A vendee has the right, if he discover the title to be defective, to refuse to receive it, and this right is not affected by the fact that the defect might have been discovered at the time of entering into the agreement to purchase by an examination of the public records." * * * "A vendee can never be bound as between him and the vendor to search the records for defects of title."

Again: "Where the title of a vendor who has contracted to convey is totally destroyed, the vendee is not bound either to offer to perform on his own part or to require performance of his vendor, but may at once treat the contract as rescinded."

To this effect also are the authorities just previously cited.

Therefore, if the basis for a selection or location was wanting, as in Clute *vs.* Robinson, *the title was*

void; and Mower had a right to repudiate the contract and seek title from the true owner.

We come back then to the question of Fletcher's title.

The trial court found this land in dispute was not subject to entry or selection under the acts of 1853 and 1866, it being included in the unadjudicated or undertermined boundaries of the Rancho Sausal Redondo. Also, that by reason of certain inherent vices in the proceedings of Squires to obtain title from the State, his patent was invalid. We may be permitted in support of the position that the limits of the Rancho named were unsettled until November, 1871, to refer to the fact that when confirmed, the Hansen survey was only adopted "*with modifications.*" And if the Land Department had power to "modify" and make slight changes, we cannot fully comprehend how the lines could be said to be fixed and determined. But this court has passed upon both questions last mentioned in the O'Connor cases at last term, and without discussing the merits of that decision *as applied to this case*, we contend that those questions do not necessarily arise in this action.

It is sufficient for our purpose that the State itself never acquired title to the land in dispute, and therefore could not possibly give a good title by patent.

The State, by its officers, simply assumed to do just what Fletcher, by his deed tendered to Mower, offered to do, namely; to grant a title to a piece of land to which it had not the shadow of title.

It is impossible for us to comprehend how the alleged title offered by Fletcher to this plaintiff in error can be sustained on any hypothesis.

His whole title or claim of title rested from its inception upon a proceeding entirely unauthorized by law He, that is his grantor, Squires, made an application to the State authorities for the land in dispute, alleging it was taken in lieu of a certain parcel he specifically describes as "included in a private grant" (Fol. 38, Record;) and this description and allegation are repeated at every step of the proceedings to the issuing of the patent, including the proceedings of the State to obtain the approval of the officers of the land department of the United States. Those officers were deceived and misled thereby, and induced to list the land to the State.

Yet the matter was patent of record, that this 36th section, or the sub-division thereof described, for which this lieu in dispute was taken, was surveyed in 1856, said survey approved and confirmed in 1857, and the plat filed, and ever since that year was "in place.". It was never, at any time, within the limits of any private grant, and was the undisputed property of the State of California when this selection was made. This fact was not even questioned on the trial of this case.

More than this: On such an application, it was, by the act of 1866, made the duty of the State officers to apply to the United States Surveyor General to furnish lists, or to examine the lists furnished by that officer, and only select in lieu of such lands as were duly certified to have been lost to the State.

The Surveyor General certifies that no such list, including the land taken for a basis, was filed—and for the very good reason that it could not be, if the list were correct.

There was, then, absolutely no basis for this selection, nor any certification of such basis by the U. S. Surveyor General.

Squires applied to the State authorities to grant him a parcel of land belonging to the United States. The United States had granted to the State certain specific sections, that is, *all* 16th and 36th sections: or in case the U. S. did not own any particular one of these sections, this fact, when ascertained, should be the basis for which another equivalent section should be selected from the public lands of the United States.

Instead of so selecting in lieu of such section lost, this applicant selects a piece of land and asks that the State procure title in lieu of a parcel of her own land, definitely located, surveyed and described—as much her property in fee as if conveyed by individual particular description by the act of Congress.

The fraud succeeded so far as to deceive the officers of the land department, and secure the listing of the land selected as lieu. There being no basis for such selection, the acts of these officers were without authority of law, and utterly void.

Patterson *vs.* Winn, 11 Wheat, 380.
Doll *vs.* Meador, 16 Cal., 295 (331) and cases cited.
Kile *vs.* Tubbs, 23 Cal., 442.
Rosecrans *vs.* Douglass, 52 Cal., 213.
Stoddard *vs.* Chambers, 2 How., 284.

A grant from the State is void where the State had no property in the land granted, or where the officers had no power to receive the entry and issue the grant. Curle, *vs.* Barrell, 2 Sneed, 63.

As we have said, this title or alleged title, was obtained by fraud, and against law. "No title can be held valid which has been acquired against law." "Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent."

Stoddard *vs.* Chambers, 2 How., 284.

Patent only conveys legal title when authorized or confirmed by Congress. Ib.

Grignon's lessees *vs.* Astor *et. al.*, 2 How., 319.

These decisions would appear to be sufficient to establish the point that in this case, there being no authority of law for any selection whatever by the State, the act of selection was void, and the acts of the United States officers in permitting such selection and certifying the land to the State thereupon, were equally so.

In the recent case of Frasher, *et. al. vs.* O'Connor, (115 U. S. 102) this court held that: "The only questions for consideration by the officers of the general Government are, whether the State possessed the right to claim the land under her grant, and whether the land was subject to selection by her agents." (Syllabus.) That was a case involving lands within the same private claim (Sausal Redondo) as in this, and it was found that upon both "questions" thus stated by the court, the affirmative was true. We have the facts here in this record that in the first or main proposition—the essential basis of right in the State—the reverse is true. She did *not* possess the *right* to *claim* the land under any grant whatever. The act of selection has no basis, and

being ostensibly "in lieu" of loss sustained under such existing right to claim land, has nothing to stand upon, and is necessarily *void*. Could the court have found either condition wanting, and have sustained the title in that case? We need not suggest that such conclusion would be impossible. Certainly the first condition cannot be waived. Both must concur; and the second is dependent as regards authority purely upon the first—the subjectiveness of land to selection, or any other disposal, being one of status, merely, and not necessarily involving the question of authority.

But it is said that the listing or certification of the land has the force and effect of a patent, and conveyed perfect title. To this it may be replied, that patent itself does *not* convey perfect title if executed without authority of law; and granting that the list has the force and effect of a patent, it may, if void for want of authority, be so declared in a court of law, upon a collateral assault, and does not require a direct suit by the Government to vacate it. To this effect are all the authorities.

> Smelting Company *vs.* Kemp, 104 U. S., 636, and cases there cited. Also Stoddard *vs.* Chambers, 2 How. 284, and other cases cited in this brief.

This certification in our judgment, is but the vesting of the title by the act of May 20, 1826, (4 Stat. 179,) being a holding "by the same tenure, and upon the same terms for the support of schools * * * as section number sixteen (or thirty-six) is or may

be held" by the State to which the grant is made. True the act of March 3, 1853, (10 Stat., 244,) gives authority to the State to select the lieu lands agreeably to the provisions of the act of 1826, just cited, instead of the Secretary of the Treasury (Interior.) But, this act also requires the approval of such selection by the Secretary of the Interior, and it is to be presumed that the title then vested in the same manner, and "agreeably to the provisions of" the said original act, as before recited. Because all this legislation was anterior to the passage of the act of March 3, 1854, (10 Stat., 346,) now section 2449 Revised Statutes, giving efficacy to lists furnished by the Commissioner of the General Land Office, and title had, theretofore, always been conceded to pass for indemnity school lands, by virtue of the grant contained in the legislative provision. Such selections were individual selections, and not lists of selection, and were listed by the General Land Office for submission to the Secretary for approval, merely as a matter of convenience.

But if, as intimated in the O'Connor cases, the title to these lands rests upon the statute of 1854, the fee simple of the same only passed to such lands as "are of the character contemplated by such act of Congress, and intended to be granted thereby," *i. e.* by the act of Congress giving the right to have such list. "But where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void"—*i. e. void absolutely*—

"and no right, title, claim or interest shall be conveyed thereby." What is this but an express declaration of a condition tacitly lying in all conveyances, that where there is no right or authority of law there is no title; that the instrument is *void*, and conveys no claim or interest?

And if it be express, to the effect that the same is "*perfectly* null and void," who is bound to observe the form of a nugatory instrument? And why shall not this court give effect to this negative declaration of express law, as well as to the affirmative confirmation which precedes it, when the lands are shown to fall within the negative, and excluded from the positive condition of the law? It is a statute to be read and enforced according to its express language, like all others, and unless there be doubt, no resort can be had to construction, nor can it be emasculated by omission of its plain words.

We are aware that this statute is perhaps unnecessary to this case; but, as it has been incorporated as in some sort a foundation for the late decision respecting lands situated in one important regard precisely like that in this suit, although differing, as we contend, in the most fundamental point, we have thought advisable to notice its general bearing and import.

The next matter for consideration is the act of March 1, 1877, (19 Stat., 267,) relating to indemnity school selections in the State of California.

The only point decided by the majority of the Supreme Court of California was that as "the plaintiff (Fletcher,) tendered his deed to the defendant (Mow-

er,) after the passage of what is known as the 'Booth bill,' * * it was entirely competent for the United States as between it and the State, to grant it to the State, * * from which it follows that the conclusions at which the court below arrived are erroneous."

Judge Myrick, concurring in the judgment, "for the reason that the defendant does not show such a failure of consideration as will defeat plaintiff's right to recover," expressly withheld any opinion "as to whether any title passed by the State Patent."

We have shown heretofore that unless title, good, indefeasible, marketable and beyond serious question passed by the state patent, Mower had a perfect defense to the action. The concurring opinion of Judge Myrick was, therefore, error, being necessarily based upon an erroneous assumption of the contemplation of the parties when entering into executory contract for title.

What foundation has the opinion of the majority?

It is matter of public notoriety and administrative history that in 1876, prior to Mower's assertion of a pre-emption claim and the repudiation of his contract with Fletcher, great excitement existed respecting the insecurity of title asserted under these indemnity selections and certifications. Ascertaining the want of regularity in the proceedings, settlers who held the State titles were alarmed, and in many cases abandoned their lands, which were immediately claimed by others as public lands under the pre-emption laws. The Interior Department sustained many of these claims, and held the title of the State

invalid. Resort was finally had to Congress, resulting, after strenuous opposition in the passage of the act named, and against even greater remonstrance, it was approved by the President.

The first section confirms the title to lands selected prematurely—that is before final survey—in lieu of lands lying within Mexican grants. This selection is not covered by that provision.

The second section makes like confirmation of lands thus prematurely selected in lieu of lands which may on future survey fall without such grants, but provides that upon such exclusion the 16th and 36th sections used as a basis shall fall to the United States, and be disposed of as other public lands. Nor does this provision confirm the selections here in question.

No lands are confirmed to the State by either of the foregoing provisions, except such as are selected in lieu of lands within exterior limits of Mexican grants—those remaining permanently in such limits being thus lost to the State, and those which shall be excluded becoming the property of the United States because of the lieu selection being already confirmed. The phrase, "or are otherwise defective or invalid," has been construed by the Attorney General and accepted by the State authorities as simply "intended to confirm to the State in spite of any defects or invalidities which have existed in its selections, *other than the defect arising from the fact that there was no original basis for the selection*," (16 op.. 69.) That is, where, in addition to the fact that there had been no final survey of the Mexican grant em-

bracing the "basis of selection," there must have been some other defect or invalidity—as "where a selection made by the State was of land then in reserve." See Syllabus. And on page 72: "The words, 'or are otherwise defective or invalid,' clearly point to defects *different* from those which have arisen by reason of the fact that there had been no loss of lands in lieu of which selections were made. And to judge from the correspondence connected with your letter the *defect which has most generally occurred* has been, by reason of the *selection of property of the United States*, which at that time *was in reserve*."

Here follows what was relied on, and misapplied, by the Supreme Court of California in this case, namely, that "it was entirely competent for the United States as between it and the State of California to grant this," meaning to grant lands in lieu of lands actually lost where the same had been taken on reserved lands, "the property of the United States," and not intending to say that a new grant was made in lieu of lands not lost and which were already the absolute property of the State of California. Evidently the court below had in mind only the alleged defect arising from the claimed reservation of Sausal Redondo, and entirely ignored the other irremediable defect of a want of basis for any selection at all.

And the Attorney General in his opinion expressly provides against this possible misconstruction; for in immediate connection (p. 73,) he says: "Of course it is to be understood in this connection, that where

there was no sixteenth or thirty-sixth section, which is the case covered by the first proviso of the second section, no title can pass to the land thus selected, and such intention is clearly indicated by the proviso."

This view is further enforced by what is said respecting double indemnity for a single loss:

As, "in certain cases two or more selections have been made in lieu of the same sixteenth or thirty-sixth section of land, I ought to add that I do not by this opinion intend to imply that the State is entitled to more than one selection in lieu of any one section." Further discussing the act, he says, "there is nothing in it from which it can fairly be inferred that where double selections are made, they were to be ratified, or that the State was by reason of any mistake in the making of duplicate selections *to obtain a greater quantity of land than had originally been allowed by law for school purposes*,"

Cases of this character, where the land was already surveyed and in place as a sixteenth or thirty-sixth section prior to attempted selection in lieu thereof, or even prior to the passage of the act of 1877, must be held as exactly covered by the language of the priviso to the second section, namely, "if there be no such sixteenth or thirty-sixth section." The language is not "if there be *no* sixteenth or thirty-sixth," but "if there be no *such* sixteenth or thirty-sixth"—that is no sixteenth or thirty-sixth section within the limits of a Mexican grant, which may be finally excluded, and on which the United States by this law may re-enter, resume its original title and dispose of as "*other* public

lands." This has been the construction of the Land Department, and accepted by the State and her grantees.

Watson *vs.* State, (Copp's Public Land Laws, 1882, Vol. 2, 1145.)
Jackson *vs.* State, *ibid*, 1150.
Abila *vs.* State, *ibid*, 1154.
Ketchum *vs.* State, *ibid*, 1156, 1157.

(Instructions of Department, Nov. 22, 1880.)

Parties holding State patents under certifications of this identical class are constantly applying to the General Land Office for vacation of the certification, and consummation of title by payment of the Government price of the lands under said proviso.

Even if the act of 1877 had given Fletcher the right to purchase (for Mower's benefit,) he had not done so at date of this action.

That Mower, armed with this title and his settlement could have obtained the title of the United States does not aid the plaintiff in his action.

Smith *vs.* Lawrence, 38 Cal., 25.

It can hardly be a question here—though raised and discussed in the State court—that this plaintiff in error could dispute the title of his grantor. He was defendant, not plaintiff, in that court, and a failure of consideration being a good defense to an action on the note, anything that tended to show such failure became vitally material.

But in any view of it, he could dispute this title. He claimed title in himself by virtue of the pre-emption laws, and if plaintiff's title was void the

land was certainly open to pre-emption, and he was in privity with the highest source of title.

Huff *vs.* Doyle, 5 Cal., 16.
Doll *vs.* Meador, 16 Cal., 295, and cases cited.

This case comes clearly within the cases there presented (or excepted,) as being in privity with the common source of title. Fletcher's covenant was to give a title *immediately operative.* He had no such title.

Pomeroy *vs.* Drury, 14 Barb., (S. C., N. Y.) 424 and cases cited.

The plaintiff below attempted to make a point that defendant below did not make a sufficient tender of rents and profiits and costs of suit, when he repudiated the void and fraudulent alleged title of the plaintiff.

This is not an action by the purchaser against the vendor, but the contrary.

It was not necessary that any tender should have been made, not even when he asserted his counter claim for judgment for money paid. Until then he had made no costs, (if, indeed, such claim in the same suit did so,) and he made his tender when or before he asserted such claim.

And his tender was sufficient for any purpose, because not objected to.

Section 2076, Cal. Code of Civil Procedure, reads as follows:

"The person to whom a tender is made, must at the time specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it, and if the objection be to the amount

of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or kind, which he requires, or be precluded from objecting afterwards."

But no tender was necessary.

The defendant (Mower) did not enter into possession and occupy as tenant of plaintiff, but upon a contract to purchase by which plaintiff was bound to give him a title. Under these circumstances no promise to pay for the use and occupation of the land can be implied.

Fletcher *vs.* Button, 4 Comst., (N. Y.) 396.

There being an absolute failure of consideration for the payment down as well as the note, there was no cause of action by the plaintiff against defendant (in the trial court) and the judgment of the District Court was correct, and that of the Supreme Court of California was erroneous, and should be reversed, and that of the District Court affirmed.

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